No. 03-____

Supreme Court, U.S.
FILED

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Supreme Court of the United States

HANS MARTICIUC, *et al.*,
Petitioners,

v.

CITY OF HOUSTON, TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 207(o) of the Fair Labor Standards Act, 29 U.S.C. § 207(o) (West 2000), as amended, 29 U.S.C. § 201 *et seq.* ("FLSA") defines the circumstances under which a public employer is permitted to deny requests for the use of accrued compensatory time. The question presented here is whether requests for use of compensatory time may be denied on the basis of a system which grants time off within a reasonable period after the request (the *employer designated* approach), or whether the specific time requested by the employee must be granted absent undue disruption to the employer (the *employee choice* approach).

The Fifth Circuit decision in this case adopted the *employer designated* approach. However, the *employee choice* approach is applied outside the Fifth Circuit by the U.S. Department of Labor and by district courts in Massachusetts, Wisconsin, North Carolina, Virginia and California. The issue is before the Sixth Circuit pending oral argument in *Beck v. City of Cleveland*, Case No. 02-3669, and was decided under a third *collective bargaining agreement deferral* approach in *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999). There is clearly a split among the federal courts of the United States regarding how the FLSA, a major federal statute, is to be applied to govern the use of accrued compensatory time.

PARTIES TO THE PROCEEDING BELOW

PLAINTIFFS/APPELLANTS/PETITIONERS

In addition to Petitioners Houston Police Officers Union and Hans Marticiuc, the following are members of the City of Houston Police Department and are also Petitioners. For convenience, they are referred to as "the Officers."

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IN THE

Supreme Court of the United States

No. 03-___

HANS MARTICIUC, *et al.*,
Petitioners,

v.

CITY OF HOUSTON, TEXAS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Hans Marticiuc and 896 other Houston Police officers, Plaintiffs in the District Court and Appellants in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Houston Police Officers' Union et al. v. City of Houston, Texas*, Fifth Circuit No. 01-21117 (April 29, 2003).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 330 F.3d 298 (5th Cir. 2003) and is reproduced as Appendix A to this *certiorari* petition. The Judgment of the Court of Appeals, entered on April 29, 2003, is reproduced as Appendix B. Mandate issued on May 21, 2003.

The District Court's opinion and order on Summary Judgment was issued on September 26, 2001 but was not reported. It is reproduced as Appendix C. The Final Judgment of the District Court, dated September 25, 2001 and entered September 26, 2001, is reproduced as Appendix D.

JURISDICTIONAL STATEMENT

The Court of Appeals' Opinion and Judgment were entered on April 29, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petition for rehearing or hearing *en banc* was filed.

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of the 1985 Amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA"), codified in 29 U.S.C. § 207(o), and the relevant implementing regulations thereto, codified in 29 C.F.R. §§ 553.20-553.28.

The 1985 Amendment to Section 7 of the FLSA is reproduced as Appendix E. The implementing regulations to the FLSA promulgated by the Secretary of Labor are reproduced as Appendix F.

STATEMENT OF THE CASE

This case presents the question of whether an employer may deny a request to use accrued compensatory time under the 1985 Amendments to the Fair Labor Standards Act, 29 U.S.C. § 207(o), pursuant to a system under which the employer grants time off after the time off requested by the employee but within a reasonable period (*employer designation*) or whether the employer rather must grant the specific time off requested by the employee unless doing so would cause undue disruption (*employee choice*).

From 1998 until adoption of a Meet and Confer agreement on July 1, 2001, the City of Houston operated under an *employer designation* system for use of accrued compensatory time, also known as a red-book system. This was the system reviewed by the Fifth Circuit. Since signing the July 1, 2001 Meet and Confer agreement, the City has operated under an *employee choice* system for use of accrued compensatory time. The Meet and Confer agreement is reproduced as Appendix G. At issue in this case is entitlement to back pay damages from June 15, 1997 to July 1, 2001, attorneys fees, and the future rule for use of accrued compensatory time in Texas, Mississippi and Louisiana.

Under the *employer designation* system in place until July 1, 2001, each unit of the police department maintained a "red book" in which officers scheduled to be off on regular days off, vacation, sick time, injury leave, training or comp time were listed for each day. The City applied a pre-set limit on the number of officers who were permitted to be off on a given day. The limit was not based on a review or analysis of the needs of the particular day and the possibility of disruption of services on that day, but rather on each unit shift commander's estimate of the unit's long-term manpower needs. An officer wanting to use accrued compensatory time was required to sign the red book for the requested day; if the red book's time-off log had not reached the pre-set limit, the officer would receive his requested time off.

If the pre-set limit had been reached, the time off was denied. The procedure involved no efforts at operational alternatives to denial, such as calling in replacements from regularly scheduled days off, vacation or training, and did not allow the payment of replacements at overtime rates. Nor did it provide that, if the requesting officer were able to find a willing and qualified substitute who required overtime pay to work, the Department would grant the requested time off and have the qualified substitute meet the staffing need. Under

this system, no effort was made to assess whether any aspect of the police department's operations would be disrupted by granting the requested day off.

Dr. Richard Jeanneret, a consultant to the City and an expert witness, testified based on data collected under his supervision that "for the most part, an employee who is eligible for compensatory time off is able to obtain approval for a specific time period requested without difficulty" and that "requests to use comp time off" were "not frequently denied."

The Fifth Circuit upheld the City's system as described by Jeanneret, endorsing the *employer designation* system over the *employee choice* system. It held that Section 207(o) "does not require a public employer to authorize comp-time use as specifically requested by an employee (subject to the undue disruption clause), but instead requires that the comp time be permitted within a reasonable period after the employee requests its use." 330 F.3d 298 (App. A at 9a).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fifth Circuit has entered a decision that directly conflicts with the approach taken by the U.S. Department of Labor and by other federal courts. In *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), a divided Sixth Circuit Court of Appeals ruled that the "timely request" requirement and its deference to agreements between the parties subsumed the "undue disruption rule" and that a minimum staffing level system could be used. In *Aiken,* a strong dissent by Judge Ryan pointed out that the Court acted without the benefit of a Department of Labor interpretation of the rule in question and that the "timely notice" and "undue disruption" rules were separate:

> The district court failed to come to grips with this argument, stating only that "the City could have allowed the officer the time off by paying another officer

overtime compensation to work in the requesting officer's place [, but] as general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time." *Aiken v. City of Memphis*, 985 F. Supp. 740, 745 (W.D. Tenn. 1997). The district court then observed that a denial of compensatory time off for that reason "only occurred occasionally and was not routine." *Id.* The plaintiffs claim it occurs all the time.

Instead of resolving this difficult, mixed question of fact and law, the district court merely held as the majority opinion in this court does, that the entire issue is governed by the collective bargaining agreement between the parties, and the collective bargaining agreement has a provision as to the reasonable period within which time off may be requested. The district court's reasoning, although to me rather abstruse, apparently is that if an officer doesn't make a request for comp time early enough to assure that his replacement need not be paid time-and-a-half, then the officer will not have requested his time off within a reasonable period. The problem, of course, with that sort of reasoning is that it conflates the concept of the reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken. Thus, the plaintiffs' claim that the logbook is being declared full for a forbidden reason is never directly engaged.

The majority opinion likewise dodges the problem simply by declaring that the whole issue is governed by the collective bargaining agreement, and the majority is "loath to interfere with [the] agreement."

To me, that answer, like the district court's answer, is no answer at all. The district court made a factual finding that "as a general policy, the Division declined to call in officers on an overtime basis in order to permit another officer off for compensatory time." *Aiken*, 985 F.Supp.

> at 745. In my opinion, this policy is precisely the practice the Department of Labor contemplated, and sought to forbid, when it declared that it would not be an undue disruption for an employer to ask one employee to work overtime in order to grant another employee time off.
>
> I would reverse the judgment of the district court with respect to this issue only. As to the remaining issues in the case I concur in the majority opinion.

190 F.3d at 764-65.

Moreover, the same question addressed by the Fifth Circuit and by *Aiken* is currently before the Sixth Circuit, awaiting oral argument in *Beck et al. v. City of Cleveland*, Case No. 02-3669. The conflict between the Fifth Circuit decision below and *Aiken* itself appears to create a conflict between the Circuits. However, Petitioners believe that the upcoming Sixth Circuit decision will intensify the conflict between the Circuits. The primary purpose of this petition therefore is to preserve the issue pending the Sixth Circuit's issuance of its decision.

Even before the Sixth Circuit has issued its upcoming decision, however, the result of the Fifth Circuit's decision is that Americans are subject to different rules governing the use of compensatory time under the FLSA based solely upon the jurisdiction in which they happen to reside. Americans who, as residents of Texas, Louisiana or Mississippi, are within the Fifth Circuit's jurisdiction, are now denied the use of their accrued compensatory time pursuant to a rule completely different from the rule applied in other jurisdictions.

An American residing within the Fifth Circuit's jurisdiction will have her request to use comp time decided under the *employer designation* rule, an approach that permits the request to be denied if the employer allows her to take time off within a reasonable period after the specific time off she requested, even if granting the specific time off requested

would not cause any undue disruption. Americans in other jurisdictions, however, will be granted the specific time off they request unless granting the specific time would cause "undue disruption" to the employer's activities because, while the details of the approaches taken by the courts in these other jurisdictions differ slightly, *all* of these other jurisdictions reject the *employer designation* approach endorsed by the Fifth Circuit and adopt instead the *employee choice* system.

Furthermore, the U.S. Department of Labor supports the *employee choice* rule. Under the Department of Labor's approach, an employer need only grant timely requests, and the regulations make clear that generally forty-eight hours would be timely. However, the parties may agree as a part of the comp time agreement to some other period. DOL's regulations provide that whether a request has been granted within a reasonable period of time is determined by the custom and practice in the work place.[1] Such practices include, but are not limited to, (A) The normal schedule of work; (B) Anticipated peak workloads based on past experience; (C) Emergency requirements for staff and services; and (D) The availability of qualified substitutes.[2]

Second, and independently, the system must provide that compensatory time requests may be denied on the basis that granting a specific request for time off will "unduly disrupt" the employer's operation or delivery of services.[3] The regulation provides:

> When an employer receives a request to use compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for a denial of compensatory time off. For an

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[1] 29 C.F.R. § 553.25 (b-c).

[2] 29 C.F.R. § 553.25(c)(1)(d).

[3] 29 C.F.R. § 553.25(d).

> agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.[4]

House Report No. 99-331 states:

> Where public employers find that they cannot make requested time off available even outside of the period of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but unavailable comp time. For those employees where the problem of disruption is persistent, comp time should not be the preferred method of compensation for overtime work.[5]

A need to find a substitute worker and to pay that worker at premium rates does not justify a finding of "undue disruption." The preamble to the Department of Labor's regulation on comp time states: "The Department recognizes that situations arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim it is unduly disruptive."[6]

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[4] *Id.* (citation omitted).

[5] Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2032 (Jan. 16, 1987); 52 Fed. Reg. 2648-03 (Jan. 23, 1987).

[6] *Id.*

Further, in a brief filed in *DeBraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wisc. 2000), the Secretary of Labor explained:

> The City also asserts that a change in its comp. time policy would cause an "undue disruption." The Secretary has defined "undue disruption" of the operations of a public agency to mean "an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity." 29 C.F.R. § 553.25(d). The City claims undue disruption of its operations by granting the use of accrued comp. time without having tried various operational alternatives, such as calling replacement officers from other shifts or from other divisions. This could be done without overtime hours being worked. In some cases, however, there may be no alternative to requiring an officer to work overtime hours so that another officer may utilize accrued comp. time, but the Secretary has determined, consistent with legislative intent, that having to work overtime does not, by itself, amount to such a disruption. Indeed, this is particularly true where the City could pay the replacement officers in comp. time and not cash overtime wages. Congress recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp. time. Compare 29 U.S.C. § 207(o)(5) ("unduly disrupt the operations of the public agency") with 42 U.S.C. § 12111(10) (Americans with Disabilities Act) ("undue hardship means an action requiring significant difficulty or expense").[7]

In *DeBraska v. Milwaukee*, Senior Judge Myron Gordon, faced with the situation in which the Milwaukee Police

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[7] Brief of the Secretary of Labor as Amicus Curiae at 19-20, *DeBraska v. City of Milwaukee*, 131 F.Supp.2d 1032 (E.D. Wisc. 2000) (No. 96-C-402).

Department granted or denied requests to use accrued comp time on the basis of preset minimum staffing levels, wrote:

> The regulation suggests that a request for a specific time period off must be granted in absence of undue disruption: For an employer to turn down a comp time request, it must in good faith believe that granting it would impose an unreasonable burden "during the time of the request." The city does not follow this approach. It denies a request automatically, without considering the issue of undue disruption, if it would require another officer to work overtime or a replacement from another shift or precinct. The city's contention that it does not deny such requests but rather grants them by offering an alternative date is also inconsistent with the regulation's use of the phrase "during the requested time."
>
> I believe the Secretary's interpretation of the FLSA comp time provision is more consistent with its regulation. Since that regulation is itself an interpretation of the FLSA's ambiguous comp time provision, the regulation is entitled to deference under Chevron.
>
> The regulation discussed above could still be clearer, however, and the Secretary's preamble to the regulations, opinion letter and amicus brief eliminated any remaining ambiguity.[8]

Judge Gordon, therefore, held that the City's administration of its comp time system does not comply with § 207(o)(5). The court then distinguished the Sixth Circuit's plurality opinion for the reasons stated in the *Aiken* dissent by Judge Ryan.

On September 6, 2002, District Judge Charles Clevert entered a final order in *DeBraska*.[9] The final order incor-

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[8] 131 F.Supp.2d at 1035-36 (citing, 52 Fed. Reg. 2012, 2017 (1987)).

[9] *DeBraska v. Milwaukee*, Order Approving Final Settlement Agreement for Judgment and Dismissal and Final Judgment, Case No. 96-C402 (E.D. Wisc. 2002).

porated and adopted as fair and reasonable an agreement of the parties to revise the City's system with regard to access to compensatory time. The new system requires that replacement officers, even those requiring overtime pay, be used prior to any determination of "undue disruption" and does not allow a refusal of a request to take compensatory time off on the basis of pre-set minimum staffing levels. The Court states in the final order:

> [T]he Administrator of Department of Labor's Wage and Hour Division informed the Court on August 12, 2002, that "the steps that the City has committed to take in the settlement agreement to enable officers to use requested compensatory time off comply with the requirements of section 207(o) of the FLSA and the implementing regulations at 29 C.F.R. § 553.25."[10]

Again, in *Canney v. Town of Brookline*, 2000 U.S. Dist. 16279 (D. Mass. October 9, 2000) (App. I), the question before the court was whether the police department could utilize a system under which the department denied an officer's request to take a particular day off as accrued compensatory time when granting the requested day off would require the employer to pay another officer at an overtime rate to work in the requesting officer's stead. This court, too, endorsed the *employee choice* rule. It held that the employer's system violated the FLSA because Section 207(o) requires the employer to grant the employee's requested day off unless the grant of that particular day off would result in undue disruption, and the payment of overtime does not constitute an undue disruption.

As in *DeBraska* and *Canney*, the court in *Long Beach Police Officers Assn. v. Luman*, CV 99-13090 FMC (JWJx) (C.D. Cal. May 10, 2001) (App. J), reviewed—and rejected—a system pursuant to which the employer denied employee

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[10] *Id.*

requests for specific compensatory time off without attempting alternatives that would allow the employer to grant the requested time off and still meet the agency's operational needs. The Long Beach police department did not try to find substitutes to cover for a requesting officer and it did not permit the requesting officer to find a substitute to work on the day for which he had requested use of compensatory leave. The court concluded that this *employer designation* system violated Section 207(o).

In *Meyer v. City of Raleigh*, 5:99 CV 324BO(3) (E.D.N.C. August 10, 2001) (App. K), Chief United States District Judge Terrence W. Boyle, ruled similarly:

> This Court agrees that maintaining minimum employment levels is crucial to ensuring safety and order in the City of Raleigh. However, to comply with the "undue disruption" standard, the City must turn down comp time requests, only when granting them would impose the unreasonable burden "during the time requested." *See* 29 C.F.R. §553.25(d). Although the applicable regulation is ambiguous as to what constitutes an unreasonable or undue disruption, the Secretary's preamble to the interpreting regulation clarifies its meaning. The preamble states that:
>
> > situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and off itself, would not be sufficient for an employer to claim that it is unduly disruptive. 52 Fed. Reg. 2012, 2017 (1987) . . .
>
> This Court finds the Secretary's interpretations persuasive and holds that, because Defendant is unwilling to substitute officers who may need to be paid overtime to grant an officer's comp time request, it thereby denies requests when doing so would not impose undue hardship. It is therefore possible for the City to grant comp time requests, even when the log book is full,

> without causing staffing levels to fall below the critical level. To do this the City need find replacement officers for the requesting officers and may, in some cases, be required to pay overtime to such replacement officers. However, to so accommodate its officers would not impose "undue hardship" on the City.[11]

Similarly, under *Alexandria Coalition of Police, Local 5, I.U.P.A. et al. v. City of Alexandria*, CA 01-1617-A (E.D.Va. March 22, 2002) (App. L), an employee's choice to take specific time off in compensatory leave must be granted even if that requires paying another employee overtime to work in the requesting employee's place. Only if granting the specific request would cause undue disruptions to the agency's operations may an employer refuse to grant an employee's choice of compensatory time off.

See also *D'Camera v. District of Columbia*, 693 F. Supp. 1208 (D.D.C. 1988) ("*D'Camera I*"); *D'Camera v. District of Columbia*, 722 F. Supp. 799 (D.D.C. 1989) ("*D'Camera II*"); *Kimpel v. Williams*, CV. 93-3341-GHK (RNBx) (C.D. Cal. 1999) (Appendix H); *Hoff v. Park*, CV 98-10245 GHK (RNBx) (C.D. Cal. 1998).

For Americans residing in all of the jurisdictions discussed above, requests for compensatory time off must be decided under an *employee choice* rule, pursuant to which the specific time off requested by the employee must be granted absent undue disruption to the employer. Furthermore, the U.S. Department of Labor applies the *employee choice* rule in all jurisdictions other than those within the Fifth Circuit. Only Americans residing within the Fifth Circuit have their comp time requests decided under an *employer designation* rule that allows their requests to be denied as long as the employer allows them to take time off sometime "within a reasonable period" of the specific date requested.

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[11] 5:99 CV 324B0(3) at 20-21 (App. K at 107a-108a).

When, as is likely, the Sixth Circuit issues a new decision on this issue that endorses the *employee choice* rule, the split will be intensified. At that point, certiorari should be granted to resolve that split.

However, even absent a new conflicting Sixth Circuit decision, certiorari should be granted to resolve the critical question of which rule governs the use of accrued compensatory time off. The manner in which an American is able to exercise his or her rights under a federal statute such as the FLSA should not be determined by something as arbitrary as where the individual happens to reside. Every public employee's use of accrued compensatory time is governed by a single federal statute; the rule controlling whether the employee's request to use accrued time will be denied should also be the same across the country. Grant of certiorari in this case will ensure that Americans who serve as public employees will be subject to the same rules controlling their use of accrued compensatory time off regardless of where they may reside.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed April 29, 2003]

No. 01-21117

HOUSTON POLICE OFFICERS' UNION; HANS MARTICIUC; ANDREA BURKE; STEVEN CAIN; RICHARD HAHN; MICHAEL LUMPKIN; SHAWN PALIN; CLYDE ROOKE; STEVEN MURDOCK; EIGHT HUNDRED EIGHTY-NINE ADDITIONAL CONSENTERS,

Plaintiffs-Appellants,

versus

CITY OF HOUSTON, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

Before JONES, SMITH, and SILER,* *Circuit Judges*.
EDITH H. JONES, *Circuit Judge*:

The principal question raised in this appeal is whether section 207(o)(5) of the Fair Labor Standards Act ("FLSA") requires a public agency to allow its employees the use of accrued compensatory time on those days specifically requested by the employees, unless to do so would "unduly disrupt" the agency's function. In support of this proposition, appellant Houston Police Officers' Union and others (collectively, the "Union") argue that this court must defer to

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* Circuit Judge of the Sixth Circuit, sitting by designation.

various statements and regulations of the Department of Labor construing section 207(o)(5). Because the statutory language is clear, however, deference is inappropriate. The summary judgment of the district court in favor of the City of Houston ("City") is accordingly affirmed.

BACKGROUND

The FLSA requires all employers, including states and their political subdivisions, to provide overtime compensation for employees who work more than 40 hours per week. 29 U.S.C. § 207 (2003). In the private sector, compensation for excess hours is to be paid at a rate of not less than one-and-a-half times the employee's hourly wage. *Id.* at § 207(a)(1). To ease the burden on public employers, Congress allows these entities to provide overtime compensation in the form of compensatory time ("comp time") at a rate of one-and-a-half hours for every excess hour worked. *Id.* at § 207 (o)(1). An employer that would utilize this provision must have a collective bargaining agreement with its employees or agreements with individual employees permitting such a practice. *Id.* at § 207(o)(2).

During the period covered by this litigation,[1] the Houston Police Department ("HPD") administered comp-time usage by way of a log known as the "Red Book," one of which was kept in each of the HPD's units. A unit's Red Book listed all of the officers in the unit who were scheduled, for whatever reason, to be off-duty on any given day. Each unit had a predetermined limit on the number of officers who could be off on a particular day. This limit was based on the shift commander's estimate of the unit's manpower needs. The primary considerations in formulating this estimate were the

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[1] The parties have stipulated that they have been in agreement since July 2001 regarding the manner in which accrued comp time is to be used. Because the Union's suit is for past damages, the parties' current agreement does not moot the statutory interpretation question this case presents.

unit's anticipated workload (based on historical trends), the unit's efficiency, and the unit's ability to tolerate disruption in its operations. In general, the Shift Commanders (with approval from Division Commanders) limited the spaces in the Red Book to ten percent of the unit's staff. An officer wishing to use his accrued comp time had to sign his name in his unit's Red Book for the day(s) he wished to take off. If the Red Book's limit for the requested day had not been reached, the officer received his requested comp time.

The Union was displeased with this system, as it could frustrate an officer's attempt to choose the dates on which he would use comp time. Instead of allowing an individualized assessment of the inconvenience that an officer's absence on a particular day might place on his unit, the Red Book system imposed an inflexible ten-percent limit on all days. Forced by the department to work overtime at the HPD's convenience, members of the Union would have preferred to use comp time for their convenience.

The Union accordingly sued the City in federal court, alleging, *inter alia*, that the HPD's Red Book system violated the FLSA by failing to provide individualized assessments of the disruption that comp-time requests over and above the ten-percent limit might cause to the operations of the HPD.

Upon receiving cross-motions for summary judgment, the district court entered summary judgment for the City, holding that the FLSA does not grant the employees of public agencies the right to use their accrued comp time on days of their own choosing. The Union appealed.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, applying the same standards as the district court. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir. 1998); *McInnis v. Alamo Cmty. Coll. Dist.* 207 F.3d 276, 279 (5th Cir. 1998). Summary judgment under Rule 56 of the

Federal Rules of Civil Procedure is appropriate only "if . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

A fact is material if it could affect the outcome of the lawsuit, and a dispute about a material fact is genuine if the evidence is such that a reasonable jury could return verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Reviewing courts must look at the evidence and draw all inferences therefrom in a light most favorable to the non-moving party. *Hibernia Nat'l Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993).

DISCUSSION

Two issues are raised on appeal: what is the proper interpretation of section 207 (o) (5), and whether the HPD correctly applied the provision to its operations. We discuss each issue in turn.

I. Section 207(o) (5)

The FLSA provides, in pertinent part, that:

> [a]n employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—
>
> (A) who has accrued compensatory time off . . . and
>
> (B) who has requested the use of such compensatory time,
>
> shall be permitted by the employee's employer to use such time within a reasonable period after making the

> request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5). The litigants offer two conflicting interpretations of this provision. The City contends that the phrase "within a reasonable period after making the request" obliges an employing public agency to authorize an employee's use of accrued comp time within a certain temporal range (a "reasonable period") following the date on which the request is made. Comp time may be delayed, nonetheless, in the event that the employee's desired usage would "unduly disrupt" the agency's operation.

Without gainsaying the plausibility of the City's interpretation, the Union advances another reading of this requirement: The employing agency must allow the employee's use of comp time on the day specifically requested, unless it would "unduly disrupt" the agency's operation. The Union fortifies its interpretation by arguing that it is advocated by the Department of Labor in at least three separate and legally relevant venues: (1) the statute's implementing regulations, Application of the Fair Labor Standards Act to Employees of State and Local Governments, 29 C.F.R. § 553 *et seq.* (esp. § 553.25), which the Department of Labor enacted in 1987, pursuant to formal notice-and-comment rulemaking ("Regulations");[2] (2) an opinion letter produced by the DOL's Wage and Hour Division in 1994, 1994 WL 1004861 ("Opinion

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[2] *See* 29 C.F.R. § 553.25(d): "When an employer receives a request for compensatory time off, it shall be honored unless to do so would be 'unduly disruptive' to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services."

Letter");[3] and (3) the amicus brief filed by the Secretary of Labor in an action resembling the instant case, *DeBraska v. City of Milwaukee*, 131 F. Supp.2d 1032 (E.D. Wisc. 2000) ("Amicus Brief").[4]

When construing a federal statute that has been interpreted by an administrative agency, courts look first to the language of the statute. If Congress has "directly spoken to the precise question at issue," *i.e.* "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984). If the statute is ambiguous, however,

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843. The *Chevron* doctrine thus requires a litigant, such as the Union, who would have a court defer to an agency's

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[3] The Opinion Letter states, "It is our position, notwithstanding [an agreement between the Police Officers Association and the City] that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public *during the time requested without the use of the employee's services.* The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive" (emphasis added).

[4] Amicus Brief at 7 ("In providing that an employee shall be permitted to use comp. time 'within a reasonable period after making the request,' Congress obviously intended to prescribe a minimum notice requirement, not a maximum time after the date of the leave request that comp. time may be used.").

regulations, to jump two hurdles. He must show that the statute is in fact ambiguous regarding the question at bar, and he must demonstrate that the regulation's statutory interpretation, whether or not preferable, is permissible. Before considering the various statements from the Department of Labor, then, the statute must be carefully reviewed.

The text of § 207(o)(5) plainly defines the period between the date the employee submits his request and the date the employer allows the employee to use the comp time: the employee "shall be permitted . . . to use such [comp] time within a reasonable period after making the request." 29 U.S.C. § 207(o)(5). As the City suggests, mandating a "reasonable period" for use of comp time is different from mandating the employee's chosen dates. The language offers a span of time to the employer, the beginning of which is the date of the employee's request.

The Union responds in two ways to this grammatically appealing interpretation. First, the Union asserts that "such time" means "the specific time requested by the employee." This is untenable, however, because within § 207(o)(5) "time" consistently refers to the number of compensatory hours to which an employee is entitled, not, as the Union would have it, to the date or dates on which an employee asks to be let off work. Words are ordinarily interpreted to have a uniform meaning in a given statutory context.

The Union also argues that "[t]he interplay between the reasonable period' and 'unduly disrupt' clauses generates ambiguity within the language of the statute." While the Union concedes that it is possible that the "reasonable period" clause refers only to the time between request and comp-time consumption, the presence of the "unduly disrupt" clause raises the possibility that the "reasonable period" clause refers, rather, to the time between intended and actual date of comp-time consumption. We understand the interaction between these two clauses quite differently. Instead of

obscuring the proper object of the "reasonable period" clause, the "unduly disrupt" clause serves to clarify its obvious meaning. The "reasonable period" clause imposes upon the employer the obligation to facilitate the employee's timely usage of his accrued compensatory time. The "unduly disrupt" clause suggests conditions, however, that would release the public employer from the previously imposed condition. The statute, thus construed, reflects a balance between obligation and exemption.[5]

Finally, according to the Union, the City's interpretation expands the impact of the "reasonable period" clause while leaving the "unduly disrupt" clause without meaning. Thus, the Union contends, when an employee makes a reasonably timely request for a specific period of comp-time leave, the employer must grant it unless doing so would unduly disrupt the agency's operation for each such request. We have just explained how a straightforward reading of the provision balances obligation and exemption. But even more to the point, the Union's explanation requires linguistic contortion where it is obvious that Congress could have chosen much simpler language to express the Union's desired policy. Had Congress intended to do as the Union suggests, alternative statutory language is not hard to envision. Congress might have worded subparagraph (B) to refer to an employee "who has requested with reasonable advance notice the use of such compensatory time," while eliminating the "reasonable period" language from the latter part of the sentence. Con-

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[5] Though there is no need to rest our argument on the cushions of armchair legislative history—the logic found in the statute's plain text is sufficient for the question at hand—the events compelling Congress to enact this statute strongly suggest the prudence of construing these two phrases as a compromise between the interests of public agencies and their employees. For an exposition of such, see Justice Thomas's discussion in *Christensen v. Harris County*, 529 U.S. 576, 578-580, 120 S.Ct. 1655 (2000). *See also Moreau v. Klevenhagen*, 508 U.S. 22, 25-28, 113 S.Ct. 1905 (1993).

gress might alternatively have substituted "as requested" for "within a reasonable period" after making the request. That Congress did not forthrightly choose such obvious means to describe employee rights undermines the Union's interpretation.

For all these reasons, we conclude that the statute does not require a public employer to authorize comp-time use as specifically requested by an employee (subject to the undue disruption clause), but instead requires that the comp time be permitted within a reasonable period after the employee requests its use. Although this conclusion ends the analysis for *Chevron* purposes, it is useful to address the errors in the Union's reliance on DOL interpretations referenced above.

First, the regulation implementing section 207(o) (5), *supra* n.2, simply does not address whether the statute mandates an employee's specifically requested dates for comp time. The regulation highlights that actual disruption, rather than "mere inconvenience," be caused to the agency as a justification for denying comp-time use, but it neither addresses case-specific determinations nor prohibits an agency from determining, as HPD has done, that an absentee rate exceeding ten percent of a unit's staff actually jeopardizes the department's ability to protect the citizens of Houston.[6] While the regulation would be entitled to *Chevron* deference if it spoke to the issue at hand, and if the statute were ambigious, that case is not before us. *See Christensen*, 529 U.S. at 587-88, 120 S.Ct. at 1663.

The Union's additional, administrative crutches include the DOL's 1994 Opinion Letter, *supra* n.3, and its Amicus Brief filed in federal district court litigation, *supra* n.4. Contrary to the Union's view, we are not obliged to defer to these interpretations of section 207(o) (5) under *Auer v. Robbins*,

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[6] We emphasize, moreover, that the Red Book limits were in practice ameliorated by an appeals process. *See infra* n. 9.

519 U.S. 452, 117 S.Ct. 905 (1997), as that case concerns judicial deference to administrative interpretations of the agency's own ambiguous regulations. *Auer*, 519 at 461, 117 S.Ct. 911; *see also Christensen*, 529 U.S. at 588, 120 S.Ct. at 1662 (referring to "*Auer* deference"); *Moore v. Hannon Food Service, Inc.*, 317 F.3d 489 (5th Cir. 2003).[7] Nor is it clear, after *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164 (2001), whether these pronouncements are sufficiently authoritative to merit *Chevron* deference. That knotty issue may be pretermitted, however, because neither the Opinion Letter nor the Amicus Brief persuades us that our construction of section 207(o)(5) is wrong or that the provision is ambiguous, as would be required for *Chevron* deference.

The Union also relies on court opinions that have perceived ambiguity in section 207(o)(5), most notably a district court in *DeBraska v. City of Milwaukee*, 131 F. Supp.2d 1032 (E.D. Wisc. 2000), but also Judge Ryan's dissent from a Sixth Circuit opinion in *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999). These cases fail to advance the Union's argument, not only because they are not legally binding, but also because they do not address the threshold issue of statutory ambiguity.[8]

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[7] The City's reliance on *Christensen* wholly to forestall our deferring to these authorities is equally misplaced. *See Barnhart v. Walton*, 535 U.S. 212, 220-22, 122 S.Ct. 1265, 1271-72 (emphasizing that agency interpretations reached through less formal means than notice and comment rulemaking are not "automatically deprive[d]" of *Chevron* deference, and "[if this Court's opinion in *Christensen*, suggested an absolute rule to the contrary, our later opinion in [*Mead*] denied the suggestion" (citations omitted)).

[8] In *DeBraska*, the most the court provides in defense of its conclusory assertion that "[t]he language of the statute is somewhat ambiguous" is its *ex post facto* judgment that "the statute could have been better written to reflect either one of the competing interpretations." 131 F. Supp.2d at 1034. Nor does Judge Ryan's dissent, despite a thoughtful discussion of the application of the DOL Regulations to the case before that court, give

II. Application of Section 207(o) (5)

The Union also attempted to adduce sufficient summary judgement evidence to suggest that, under the HPD's "Red Book" System, complainant police officers were unable to use their accrued comp time within a "reasonable period after making the request." After a careful review of the record, this court concludes, as did the district court, that the Union has failed to create a geuine issue of material fact on the HPD's alleged misapplication of section 207(o)(5).

The principal evidence to which the Union points consists of the following: (1) the deposition of Joe L. Breshears (HPD Executive Assistant Chief); (2) HPD General Order 300-07, September 18, 1995; (3) the data and testimony of Dr. P.R. Jeanneret (HPD expert witness); and (4) the memorandum of G.S. Stewart (Assistant Chief, South Patrol Unit, HPD). These documents do not, either individually or collectively, present any evidence whatsoever that the HPD's Red Book System prevented the city's police officers from using accrued comp time within a "reasonable period after making the request." The most that can be found here is some slight evidence of the fact that certain forms of police work, particularly patrol duty, are ill-suited to the removal and substitution of non-fungible officers.

To review the evidence briefly: In the deposition testimony of Chief Breshears can be found a detailed description of the manner in which the Red Book policy was formulated and administered; in General Order 300-07 there is a formal

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the slightest consideration to the question of the statute's ambiguity. Finally, the Union cites three other cases in which federal district courts found the statute to be ambiguous. *Meyer v. Raleigh*, 5:99 CV 324 BO(3) (E.D.N.C. Aug. 10, 2001); *Long Beach Police Ass'n v. Luman*, CV 99-13090 FMC (JMJX) (C.D. Cal. May 10, 2001); *Canney v. Brookline*, 2000 U.S. Dist. 16279 D. Mass. October 19, 2000). The Union did not provide copies of these difficult-to-access decisions, and they are district court cases, from other circuits, that do not bind us.

policy statement of the same; and in Chief Stewart's memorandum are the results of a poll, saying, once again, that comp time could be taken on a first-come, first-served basis. The sharpest version of all, of course, is the information provided by Dr. Jeanneret, as his data and testimony were prepared by the HPD in response to this suit. In none of these reports is there the slightest hint that the Red Book system, either in theory or practice, violated the FLSA as interpreted above.[9]

Nonetheless, one of the Union's points calls for a more substantial response. This is that officers on patrol duty had experienced rather more substantial delays in their ability to consume their accrued comp time.

The report prepared by Dr. P.R. Jeanneret concluded with the following statement: "For the most part, an employee who is eligible for compensatory time off is able to obtain approval for a specific time period requested without difficulty." Dr. Jeanneret goes on, however, to note an exception to this general rule:

> The exception to this conclusion occurs in Patrol and especially those divisions that have a high volume of calls for service. The divisions with high volumes of service calls where operations have been using below minimum staffing levels presented circumstances when not everyone might be able to obtain the specific compensatory time off they had requested. These relatively limited circumstances arise when the red book slots are filled and when making exceptions would present the

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[9] Even more surprising, the summary judgment evidence in this case also fails to sustain the Union's own interpretation of the FLSA. In Chief Breshears' testimony and Dr. Jeanneret's report there is a strong suggestion that the HPD did a more-than-adequate job of responding, via an informal appeals system, to officers' individual requests to override the Red Book's theoretically mandatory ten percent absentee quota.

> division with safety concerns and unacceptable increases in response time to calls for service.

While the Union does not appear to dispute Dr. Jeanneret's basic conclusion, it argues that his qualification of the general rule is significantly understated. What he fails to mention, the Union argues, is that of the over 5000 police officers in the HPD, approximately 40% work in patrol. The exception thus swallows the rule.

The Union's clarification does not suffice to create a fact issue concerning HPD' s violation of section 207(o)(5). First, the proposition to which this factum constitutes an exception is not an exception to the assertion that Houston police officers were unable to take compensatory time "within a reasonable period after making the request." It is apposite, rather, to the proposition that officers are "able to obtain approval for a specific time period requested without difficulty." As has been discussed, the FLSA does not grant such a right. The HPD's denial of such an option to patrol officers cannot, therefore, be actionable.

We also note, moreover, that this exception would be void of legal significance even if the Union's reading of the FLSA were correct. This is so because requiring comp-time usage-on-demand would, as Dr. Jeanneret's uncontroverted analysis concludes, "unduly disrupt" the operations of the HPD. As he said:

> Such understaffing would severely impact the operational efficiency and effectiveness of HPD and undermine the Department's continued efforts to provide the required levels of service within the budget allocations provided in the City of Houston.

In other words, local neighborhoods could be seriously adversely affected when too many regular duty officers are off work. The FLSA requires, generally, that officers be allowed to take comp time within reasonable periods after

making their requests. The burden that this statute places upon public employers is waived, however, in those circumstances where compliance would "unduly disrupt the operations of the public agency." This balance represents the statutory compromise between the interests of public agencies and their employees. Without adequate evidence placing Dr. Jeanneret's conclusion of undue disruption into dispute, this court must conclude, as did the district court, that the Union has no claim cognizable under section 207(o) (5).

CONCLUSION

The clearly articulated details of § 207 of the FLSA strike a balance between the employee's right to use comp time promptly and the public agency's need to avoid disruption, a balance expressed with sufficient clarity to resolve the interpretive dispute before us. Moreover, the Union's summary judgment evidence is insufficient to create a fact issue over HPD's alleged misapplication of section 207(o)(5). This court accordingly affirms the district court's grant of summary judgment to the City.

Judgment AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 29, 2003]

No. 01-21117
D.C. Docket No. H-00-CV-2184

HOUSTON POLICE OFFICERS' UNION; HANS MARTICIUC; ANFREA BURKE; STEVEN CAIN; RICHARD HAHN; MICHAEL LUMPKIN; SHAWN PALIN; CLYDE ROOKE; STEVEN MURDOCK; EIGHT HUNDRED EIGHTY-NINE ADDITIONAL CONSENTERS,

Plaintiffs-Appellants,

v.

CITY OF HOUSTON, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston

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Before JONES, SMITH, and SILER*, *Circuit Judge*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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* Circuit Judge of the Sixth Circuit, sitting by designation.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAY 21, 2003

A True copy
Test:

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ [ILLEGIBLE]
Deputy
New Orleans, Louisiana May 21, 2003

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Sept. 26, 2001]

Civil Action No. H-00-2184

HOUSTON POLICE OFFICERS' UNION, *et al*,
Plaintiffs,

vs.

CITY OF HOUSTON POLICE
DEPARTMENT and CITY OF HOUSTON,
Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court in the above-referenced action are Plaintiffs Motion for Partial Summary Judgment (Inst. No. 33) and Defendant City of Houston's Cross-Motion for Summary Judgment (Inst. No. 38). After reviewing the record and the applicable law, the Court concludes that Plaintiffs partial summary judgment motion should be DENIED, and that Defendant's cross-motion for summary judgment should be GRANTED.

I. BACKGROUND

In this action for declaratory judgment, brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, Plaintiffs Houston Police Officers' Union *et al.* (collectively referred to as "HPOU") sues Defendant City of Houston ("City") for alleged unlawful calculation of overtime compensation, use of improper overtime rates, and an overall intentional failure to pay members of HPOU all proper compensation due.

Plaintiffs in this case include current and former police officers employed in the Houston Police Department ("HPD") by the City. HPOU is the certified bargaining representative for the original eight named Plaintiffs and the other similarly-situated 889 officers in this case, pursuant to Chapter 143, Subchapter J, § 143.351 of the Texas Local Government Code. HPD is an official department and agency of the City, established and authorized by the City to provide law enforcement services for the City. Defendant City of Houston is the official government authority responsible for the provision, organization, management, and operation of law enforcement within its jurisdiction.

In 1998, officers in the HPOU and the City entered into a "Meet and Confer Agreement" ("MCA"), which outlines the terms of the officers' employment. The MCA reflects the parties' effort to develop fair and equitable standards for wages, hours, and other terms and conditions. In this case, the terms of the MCA give rise to at one least aspect of HPOU's lawsuit against the City; specifically, HPOU complains (a) that the City's calculation of pay should include the equipment allowance that is provided for under the MCA, and (b) that the City's scheduling of compensatory time violated the FLSA. The Court addresses both claims below.

II. STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exists and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990).

If the non-movant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant makes this showing, the burden shifts to the non-movant to show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US. 574, 586 (1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871-73 (1990); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994)). Rather, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the non-movant. *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir. 1996) (*per curiam*); *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

III. DISCUSSION

As a general matter, the FLSA requires employers, including states and their political subdivisions, to pay overtime compensation to employees who work more than forty hours per regular work week. 29 U.S.C. § 207 (1993). As employers, municipalities such as the City of Houston are required to compensate their employees for excess hours at a rate not less than 1½ times their hourly wage. 29 U.S.C. § 207(a)(l). *See Christensen v. Harris County*, 529 U.S. 576,

579 (2000) (detailing how Congressional amendments to the FLSA eventually resulted in the 1½ overtime pay standard being applied to state employers). Pursuant to various Congressional amendments to the FLSA, however, public employers also have the option of paying employees for overtime by granting them compensatory time, instead of compensatory pay, at a rate of 1½ hours for every hour worked. 29 U.S.C. § 207(o)(1). *See Christensen*, 529 U.S. at 579 (discussing Congressional amendments that mitigate the effects of FLSA on states and their political subdivisions).

A. Equipment allowance.

When an employer provides compensatory pay, the FLSA mandates that such overtime pay be at least 1½ times the "regular rate" of the employee. 29 U.S.C. § 207. As the Supreme Court has recognized, the regular rate is the hourly rate that the employer pays the employee "for the normal, non-overtime workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 425 (1945); *see Lee v. Vance Executive Protection, Inc.*, No. 00-1330, 2001 WL 108760, at *2 (4th Cir. Feb. 8, 2001). Section 207(e) of the FLSA provides that the "regular rate" comprises "all remuneration . . . paid to . . . the employee," except for eight specific types of payments that are excluded from the regular rate. *See generally* 29 U.S.C. § 207(e)(1)-(8).

In this case, one of the terms in the MCA between HPOU and the City involves an equipment allowance. Specifically, the fifth paragraph of Article 16 of the MCA states that the City shall provide each police officer an equipment allowance that is "payable biweekly"; the purpose of the equipment allowance is to compensate officers for money spent on necessary equipment, such as guns, ammunition, pepper spray, uniform shoes, and the like. Under the equipment allowance provision, the City pays each police officer either $46.15 or $70.19 on a biweekly basis; this amount equates to either $1200.00 or $1825.00 on an annualized basis.

The equipment allowance for each two-week period does not necessarily reflect the exact expenses made by police officers in the course of the two weeks, however. Indeed, police officers are not required to submit receipts to the HPD or the City showing how much money they actually spend on equipment in a given period. HPOU further states that no provision explicitly requires officers to spend their equipment allowance on items related to their official work as police officers.

Of controversy in this case is the fact that the City does not include the equipment allowance in the "regular rate" of its officers' pay for the purposes of calculating the officers' overtime pay. The economic incentives at stake in this case are clear: the larger the amount categorized as "regular rate," the larger the officers' overtime pay, given that overtime pay is calculated at 150% the regular rate. As a result, Plaintiff HPOU now moves for partial summary judgment and argues that the City's equipment allowance should be counted as part of each officer's regular rate because it does not fall into any of § 207(e)'s exceptions.

HPOU in particular argues that the equipment allowance is not a gift; it is not vacation or sick leave or other leave pay; it is not discretionary, for it is provided for in the MCA; it is not contributed to, or paid from, a trust or employee benefit plan; and it is not a premium rate. (Pl.'s Mem. In Support of Part. Summ. J. at 5.) Moreover, HPOU points out that the equipment allowance is not calculated as a dollar-for-dollar reimbursement of any expense an officer incurs within a given pay period. Rather, according to HPOU, the amount of the equipment allowance is essentially arbitrary and structured biweekly simply for the convenience of the payroll system. The result is that an officer's particular expenditures in a given two-week period have no impact whatsoever on the amount of equipment allowance he receives for that period. HPOU also points out that the City does not require, and the

officers do not provide, any receipts for the purpose of calculating an officer's equipment allowance for a given pay period. Additionally, HPOU states that the equipment allowance is taxable income that is not excluded from federal income tax as a business expense.

In sum, HPOU takes the position that, because the equipment allowance is not specifically included among the FLSA's eight exceptions, and because the equipment allowance operates independently of an officer's expenses made, the allowance should be included as part of each officers' regular rate. Under the City's current practice of not including the equipment allowance in the regular rate, HPOU argues, the officers' overtime compensation (which, as discussed above, is based on the regular rate) is incorrectly calculated. HPOU states that, were the equipment allowance included, "each officer's overtime rate would be increased by 2.2%," which "would have represented an additional $1,146,000 in increased overtime [pay] for fiscal year 1999." (Pl.'s Statement of Uncontroverted Facts at 4.)

In determining whether the City's exclusion of the equipment allowance from the officers' regular rate violates the FLSA, or whether the equipment allowance correctly falls into one of the eight exclusions of § 207(e), the Court at the outset notes that the FLSA presumes that all remuneration is to be included in the regular pay rate. *See Madison v. Resources for Human Development, Inc.*, 233 F.3d 175, 187 (3rd Cir. 2000) ("[T]here is a statutory presumption here that remuneration in any form is included in the regular rate calculation."). As discussed above, the FLSA expressly provides the regular rate of pay "shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee" unless it falls under one of the eight specific exemptions. See 29 U.S.C. § 207(e). Courts have recognized that exemptions to the FLSA are to be "narrowly construed, giving due regard to the plain meaning of statutory language

and the intent of Congress." *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001); *see Lee*, 2001 WL 108760, at *3 (holding that FLSA "exemptions must be narrowly construed"); *Minizzu v. Stone Container Corp. Corrugated Container Div. East Plant*, 842 F.2d 1456, 1459 (3rd Cir. 1988) (holding same).

Moreover, courts have also recognized that "the general rule is that the application of exemption under the [FLSA] is a matter of affirmative defense on which *the employer* has the burden of proof." *Clark v J.M. Benson Co., Inc.*, 789 F.2d 282, 286 (4th Cir. 1986) (citations omitted) (emphasis added); *see McLaughlin v. McGee Bros Co., Inc.*, 681 F. Supp. 1117, 1133 (W.D.Y.C. 1988) (citing *Clark* and holding same); *see also Idaho Sheet Metal Workers, Inc. v. Wirtz*, 383 US. 190, 209 (1966) (holding that the employer bears the burden of establishing an exemption under the FLSA); *Gieg*, 244 F.3d at 776 ("[A]n employer who claims an exemption from the FLSA has the burden of showing that the exemption applies.") (citations omitted); *Johnson v. City of Columbia*, 949 F.2d 127, 130 (4th Cir. 1991) (holding that the burden is on the employer "to show that it is entitled to the benefits of th[e] exceptions").

In its Response and Cross-Motion for Summary Judgment, the City of Houston argues that the equipment allowance *does* fall into one of the eight exemptions of § 207. Specifically, the City points to the second exemption, which covers "reasonable payments for traveling expenses, *or other expenses*, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment. . . ." 29 U.S.C. § 207(e)(2) (emphasis added). The City moreover directs the Court's attention to the Department of Labor's regulation

that elaborates on the exclusion. As the Department of Labor explains,

> Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount *reasonably approximates* the expense incurred). Such payment is not compensation for services rendered by the employee during any hours worked in the workweek.
>
> . . . .
>
> If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

29 C.F.R. § 778.217(a), (c) (emphases added). From this language, the City characterizes the FLSA exemption at issue as being governed by a *de minimis* standard: if the allowance is not disproportionately large compared to the employee's actual expenses, then the exemption applies. (Def.'s Resp. to Pl.'s Mot. for Partial Summ. J. and Cross-Mot. for Summ. J. at 2.).[1]

In its response to HPOU's partial summary judgment motion, the City relies on the above language and initially argues that it is entitled to summary judgment because HPOU has failed to show that the equipment allowance unreasonably exceeds the officers' expenses. While such an argument, at first blush, fails to appreciate the City's burden of establishing the exemption invoked, the Court nonetheless holds

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[1] Although the City relies on the Department of Labor's regulation, the City does not demonstrate that this particular regulation has been "adopted pursuant to [an] explicit grant of rulemaking authority." *Bean v. Bureau of Alcohol, Tobacco, and Firearms*, 253 F.3d 234, 240 (5th Cir. 2001). As a result, the regulation is merely an interpretive guide. *See id.* Nonetheless, the Court finds the Department of Labor's interpretation highly persuasive and treats it as such. The Court additionally notes that HPOU has not argued against the consideration of this regulation.

that the City has carried its burden on the matter. The City points out that, unlike most metropolitan police departments, HPD does not issue weapons, ammunition, handcuffs, flashlights, pepper spray, or even uniform shoes to its officers for use in the field. According to the City, HPD examined the costs involved in providing such equipment and fashioned an equipment allowance that reasonably approximates the expenses the average officer would incur. (Dep. of M. W. Thaler at 11, 17, 18; Dep. of Larry Yium at 19, 20.)

The record bears out the HPD's approximation. In its Rejoinder on the Pending Summary Judgment Issues, the City points to the interrogatory answers of numerous police officers that purport to represent accurately the average expenses of each plaintiff. For example, in Officer Plaintiff Anthony Alacantara's ("Alacantara") interrogatory answers, Alacantara detailed his equipment-related expenditures since November 28,1998 and his annualized spending. In one year, Alacantara purchased: ammunition for on-duty use; ammunition for practice purposes; an ASP holder; flashlight batteries; pepper spray with holder; a copy of the penal code; dress uniform shoes; duty shoes; dry-cleaning of uniforms; holsters; briefcases; belts; ammunition holders; dress clothes for plain-clothes work; socks; underwear; and pens. When asked how much money this equipment cost him on an annual basis, Alacantara indicated that his annual equipment expenses for 1998 approximated $1920.

The interrogatory answers of Plaintiff Charles Allen ("Allen") indicated comparable equipment-related expenditures. Since November 28, 1998, Allen spent money on: ammunition for on-duty use; duty shoes; dry-cleaning of uniforms; cell phone use; DRE Pin; pens; a Drug Recognition Book; and gasoline for travel to and from court on an off-duty basis. His expenses totaled around $1447 for the year.

Similarly, Plaintiff Ruston Keith Alsbrooks's ("Alsbrooks") equipment included: an on-duty handgun; an off-

duty handgun; handcuffs; ammunition for on-duty use; ammunition for practice purposes; a baton and baton-holder; flashlight batteries; pepper spray; a copy of the penal code; dress uniform shoes; duty shoes; and dry-cleaning of uniforms. Alsbrooks's annual equipment expenses approximated $2445.

The Court notes that the answers of the other named plaintiffs paint roughly the same picture of expenses. While some types of expenses were common among all officers, such as ammunition or dry-cleaning, some types of expenses were unique to the individual officer: For example, Plaintiff Ruben Arias spent approximately $200 in haircuts for the year, as well as $50 for shoe polish and $250 for uniform alterations. Plaintiff Roosevelt Ashford had to buy an aviation pen light ($15), flight gloves ($50), and a flight jacket ($125). Plaintiff David Baideraz had to purchase a 35mm camera at a cost of $600. Plaintiff Michael Bedner spent approximately $1000 for the year in babysitting fees. Plaintiff Joel F. Cadriel purchased cellular phone service for $900 during the year, and his pager service cost him $720. Despite the individualized nature of the officers' various expenses, however, HPOU has stipulated that the above officers' average expenditures are roughly representative of all the Plaintiffs and Consenters in this case.

It is with this evidence that the Court finds that the $1200-to-$1800 equipment allowance "reasonably approximates" the expenses incurred by the numerous officers in the HPD. As discussed above, the Department of Labor has interpreted § 207(e)(2) of the FLSA to mean that expense payments or allowances made by an employer are not considered part of the regular rate "if the amount reasonably approximates the expense incurred." 29 C.F.R. § 778.214(a). Indeed, the Department has opined that only if "the amount paid as 'reimbursement' is disproportionately large [will] the excess amount [] be included in the regular rate." *Id.* Finding the

Department's interpretation highly persuasive, the Court thus holds that the City has carried its burden in showing that the equipment allowance is properly excluded from the regular rate. A cataloging of various representative personal budgets among the police officers demonstrates that an individual officer can expect to have equipment-related expenses in the range of $1400 to $2400 a year; the City's equipment allowance of $1200 to $1800 annually is a reasonable approximation, and thus a reasonable allowance, for that cost. As a result, the City's equipment allowance, as currently structured, properly belongs outside the regular rate of § 207(e).

Moreover, with regard to HPOU's argument that the City collects no receipts from the officers and that the equipment allowance is taxable as non-exempt income, the Court finds no statutory provision, regulation, or letter ruling that ties an allowance's tax treatment to the issue of regular rate calculation. Similarly, HPOU has not pointed to any source of law, mandatory or persuasive, that obligates an employer to require employees to submit receipts of expenditures for the purposes of § 207(e). Again, the touchstone for the inquiry rather lies in the reasonableness of the allowance *vis-à-vis* the expenses actually incurred. Finding that such reasonableness exists in the instant case, the Court grants summary judgment for the City.

B. Use of compensatory time.

As discussed above, a public employer like the City of Houston may provide compensatory time ("comp time"), instead of overtime pay, to its employees. However, if an employer provides comp time, such an arrangement may only be pursuant to:

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

> (ii) in the case of employees not covered by subclause (1), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .

29 U.S.C. § 207(o)(2); 29 C.F.R. § 553.23 (1999). In this case, it is the standard practice of the City of Houston to compensate its officers through overtime pay or comp time. *See* Police General Order 100-03 (defining "overtime compensation" as "money *or time off* that has been authorized by the City Council" (emphasis added)). Neither party disputes the validity of the practice.

Rather, HPOU in the instant case complains that the City violates the FLSA *by the manner* in which it administers the comp time. Particularly relevant to this claim is § 207(o)(5) of the FLSA, which provides in relevant part:

> An employee of a public agency which is a Sate, political subdivision of a State, or an interstate governmental agency . . . who has accrued compensatory time off . . . and . . . who has requested the use of such compensatory time, shall be permitted by the employee's employer *to use such time within a reasonable period of after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.*

29 U.S.C. § 207(o)(5) (emphasis added). The City's Police General Order 300-07 parallels the FLSA language and provides that "[w]hen a supervisor receives a request for use of compensatory time off, it will be approved unless to do so would be unduly disruptive to the operation of the unit." Police General Order 300-07. In the HPD, officers can accumulate up to 480 hours of comp time; once an officer has reached the 480-hour limit, he is required to work for cash overtime. (Dep. of Breshears at 32-33.) *See also* 29 U.S.C. § 207(o)(3)(A). Plaintiff HPOU complains that the HPD's

system violates the FLSA in that the HPD's comp time system does not, in actual practice, allow the officers to use their accumulated compensatory time on the days requested.

In the day-to-day administration of compensatory time, each HPD unit maintains a Red Book or similar diary. In that book, officers scheduled to be off on either vacation or comp time are listed for each day. In all cases, and in all units, there exists a pre-set limit on the number of officers who may be off on a given day. Such limits are based on each unit shift commander's estimation of the unit's manpower needs; as HPOU states, the primary considerations going into such an estimation are efficiency of the unit and avoiding disruption of the unit's operation. Indeed, the general policy at the HPD is to limit the number of officers allowed time off to 10% of the staffing of each unit.

The Red Book's pre-set limits are set over long periods of time and do not reflect a specific day's needs for police service. An officer wishing to use his accrued compensatory time must sign his name in his unit's Red Book; if the Red Book's time-off log has not reached its limit, the officer receives his requested comp time off, but if the Book is fill, the officer's request is denied.

In this case, Plaintiff HPOU complains that the practice of closing the Red Book, premised entirely on long-term staffing estimations, violates the FLSA because it too often denies police officers their use of compensatory time already earned and accumulated. HPOU in particular focuses on the phrase "unduly disrupt" in § 207(o)(5) and argues that, at its essence, the FLSA requires an employer to grant an employee's request for the use of banked compensatory time in all circumstances, except when the HPD can show that the use of comp time would unduly disrupt the HPD's operations. To HPOU, the City's closing of the Red Book for a certain day (based on long-term manpower estimations) fails to satisfy

the undue disruption requirement because the City makes no effort to ascertain the undue disruption for the particular day for which comp time is requested.

To support its argument, HPOU cites various authorities, including the Secretary of Labor's regulatory interpretation of § 207(o)(5)'s "undue disruption" language. The Secretary's interpretation states:

> *Undue Disruption.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time. For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.25(d) (emphases added). To HPOU, the Secretary's interpretation is significant for two reasons: (l) it precludes inconvenience as a valid basis for the City to deny an officer's requested compensatory time, and (2) it implies that, to deny an officer's request based on "undue disruption," the undue disruption inquiry must be specifically tailored to the particular day requested, rather than on the City's long-term manpower estimations.

HPOU also cites the August 1994 opinion letter of the Department of Labor's Wage and Hour Administrator for the proposition that an employer must generally grant an employee's request for compensatory time, even if such granting would require the employer to use another employee on an overtime basis. The 1994 letter specifically opines:

> It is our position, notwithstanding [a memorandum of understanding to the contrary], that an agency may not

> turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be requested of one employee to permit another employee to use compensatory time off would not be reason for an employer to claim that the compensatory time off request is unduly disruptive.

Letter Ruling, August 19, 1994. Based on these sources, as well as the reasoning of two recent district court cases, HPOU takes the position that the City's Red Book system fundamentally violates the FLSA.

In response, the City of Houston characterizes HPOU's argument as essentially calling on the City to allow all officers use of any accrued compensatory time "on demand, without regard to any reasonable restriction necessary to business operations or additional costs to the employer." (Del.'s Reap. to Pls.' Mot. for Partial Summ. J. and Def.'s Cross-Mot. for Surnm. J. at 8.) The City argues that HPOU's position is legally deficient because it improperly focuses on only one half of § 207(o)(5)'s test. While § 207(o)(5) generally requires public employers to allow employees to use their requested compensatory time, the City points out that the general rule is subject to two caveats: when confronted with an employee's request for comp time, an employer need only (1) grant comp time that is within a "reasonable period" of the employee's requested date, and (2) if the employer does not grant the comp time within a reasonable period, the only excusable reason is for undue disruption. Based on this rule, the City essentially takes the position that the undue disruption issue is irrelevant in this

case because even if the City denies an officer's request for a particular day off, it almost always grants the officer comp time within a reasonable period of the request.

The Court agrees with the City. As discussed above, 29 U.S.C. § 207(o)(5) provides that a public employee who has requested the use of comp time "shall be permitted by the employee's employer *to use such time within a reasonable period after making the request* if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5) (emphasis added). The question arises as to what the meaning of "reasonable period" is and to what does it refer. As the court for the Eastern District of Wisconsin suggests in *Debraska v. City of Milwaukee*, No. 96-0-402 (E.D. Wis Sept. 26, 2000), the FLSA's "reasonable period" requirement could mean that "an employee must give adequate notice that he wants to use comp time on a particular day, thereby giving the employer time to plan and to determine whether the request can be granted." *Id.* at 6. Such an interpretation thus views the reasonable period requirement as an obligation placed on the employee. A different interpretation, however, would hold that the phrase refers to the time period between the date the employee requests off and the date the city will actually allow him to take off; this explanation essentially views the "reasonable period" language as allowing the employer greater latitude in satisfying a comp time request under § 207(o)(5).

The Court adopts the latter interpretation in light of the express language of the statute and the Department of Labor's regulations. Although the district court in *Debraska* held that the "reasonable period" language is ambiguous, this Court finds no such ambiguity because the statute's language clearly requires only that an employer allow the employee "to use [comp] time within a reasonable period after making the request . . . ." 29 U.S.C. § 207(o)(5). The statute therefore does not require that a public employer grant an employee

comp time for a *specific day*; rather, it mandates only that the granted comp time be reasonably close in time to when the employee made the request. By its clear terms, then, the FLSA grants employers like the City of Houston some degree of latitude in scheduling an employee's requested comp time.

The Department of Labor's definition of "reasonable period" for the purposes of § 207(o)(5) further supports the notion that a public employer need only grant the officers comp time that is reasonably close to the request. As the regulation states:

> *Reasonable period.* (1) whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances of each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

29 C.F.R. § 553.25(c). The Court particularly notes that the Department of Labor's interpretation does not read into the "reasonable period" standard the requirement that an employer must grant its employees their requested comp time for the exact, specific day requested. Rather, the regulation centers the reasonable-period inquiry on the actions of the employer, and it echoes the FLSA's concept that an employer will be deemed to have satisfied the FLSA so long as he grants the use of the compensatory time within a reasonable period of the request. Indeed, the regulation lists various factors (including "anticipated peak workloads" and "emergency situations") that clearly contemplate the possibility that an employer may refuse to grant an employee's comp time request for the specific day requested.

In sum, to adopt HPOU's argument in this case would be to read the "reasonable period" language out of the FLSA. As discussed above, the essence of HPOU's argument is that the officers are entitled to use their accumulated comp time on the specific day they request unless the HPD can prove undue disruption with respect to the specific day requested. HPOU's position would possibly have merit if the statute merely read: "An employee . . . shall be permitted by the employee's employer to use [compensatory] time . . . if the use of the compensatory time does not unduly disrupt the operations of the public agency." Of course, even then, the statute would still be silent as to whether an employer was obligated to grant the employee the requested comp time for the exact day requested.[2] As written, however, the statute instead expressly provides: "An employee . . . shall be permitted by the employee's employer to use [compensatory] time *within a reasonable period after making the request* if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5) (emphasis added). Not only does the plain language of the statute not require employers to grant the specific day requested but, indeed, the statute, by its own terms, is satisfied so long as the comp time granted is reasonably close in time to the request. *See Aiken v. City of Memphis*, 190 F.3d 753, 756 (6th Cir. 1999) (recognizing the importance of the "reasonable period" language and stating that the "fundamental defect in the plaintiffs' position . . . [was] that it completely ignore[d] the phrase 'reasonable period").[3]

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[2] Therefore, even if the "reasonable period" language were jettisoned from the statute, the success of HPOU's argument would still be in doubt. When the FLSA "is silent on [an] issue and [when the public employer's] policy is entirely compatible with § 207(o)(5)," a plaintiff generally cannot prove that the employer has violated § 207. *See Christensen*, 529 U.S. at 585.

[3] The Court also recognizes that the policy considerations underlying § 207(o) strongly undercut any argument that public employers are

The record in the instant case demonstrates that the HPD's use of the Red Book system in administering comp time satisfies the FLSA because it affords the officers comp time within a reasonable period of each officers' request. While the HPOU fails to point to any competent evidence that challenges the reasonableness of the Red Book system, the Court notes that the City's expert, Dr. P. Richard Jeanneret ("Dr. Jenneret"), studied the HPD's comp time practices and concluded that, "[f]or the most part, an employee who is eligible for compensatory time off is able to obtain approval for a specific time period requested without difficulty." (Report of Jeanneret at 12.)[4] Additionally, Dr. Jeanneret

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required to grant employees the specific comp days requested. As the Supreme Court recognized in *Christensen*, Congress granted public employers the right to compensate their employees for overtime with comp time (instead of overtime pay) as part of an effort to "mitigate the effects of applying the FLSA to States and their political subdivisions . . . ." *Christensen*, 529 U.S. at 579. Fiscal concerns largely motivated such mitigation because "[t]he projected `financial costs of coming into compliance with the FLSA—particularly the overtime provisions'—were specifically identified as a matter of grave concern to many States and localities." *Moreau v. Klevenhagen*, 508 U.S. 22, 26 (1993) (citing S. Rep. No. 99.159, p. 8 (1995)). It is with the understanding that § 207(o)(5) represents an amelioration of the FLSA for public employers that the Court presently reads the statute as not requiring employers always to grant comp time for the specific day requested.

[4] Dr. Jeanneret's report indicated that the Patrol divisions presented the only exceptions to the general rule that officers were granted the compensatory time requested within a reasonable period. To the extent that officers within the Patrol divisions were denied compensatory time within a reasonable period, the Court finds that the City has satisfied the "undue disruption" prong of § 207(o)(5). Dr. Jenneret's report specifically outlined the disruption caused by personnel reassignment in these divisions; the problems included officers becoming lost, officers' lack of knowledge of the traffic patterns of the areas, officers' ignorance with regard to local "hot spots" and troublemakers, officers' inability to work effectively in a culturally-specific area, teamwork issues, the compromise to the HPD's philosophy of neighborhood policing, and overall response times to calls. (Report of Jeanneret at 9-10.) In light of this evidence, and in the absence

[_____] Red Book system was based on historic data regarding calls for service and absence patterns, that exceptions were made by the lieutenants in order to accommodate comp time requests, and that the requests were not frequently denied. (Report of Jeanneret at 4-5.) As noted above, the Department of Labor itself defined "reasonable period" as including considerations of the "normal schedule of work" and "anticipated peak workloads based on past experience." 29 C.F.R. 553.25(c). In light of the record, and given the absence of any competent evidence to the contrary, the Court finds that the City's Red Book system satisfies the FLSA's requirement that the City grant its police officers comp time within a reasonable period.

Summary judgment is thus appropriate on HPOU's compensatory time claim. Although HPOU largely relies on the Department of Labor's August 1994 opinion letter for the proposition that "an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency," Department of Labor, Letter Ruling, August 19, 1994, the fundamental deficiency in such an argument (and in the Department's opinion letter) is that it fails to account for the "reasonable period" language in § 207(o)(5).[5] The Court can discern no

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of any competent evidence to the contrary, the Court finds that the City has shown specific undue disruption for specific divisions within the HPD that would warrant the denial of comp time within a reasonable period.

[5] While the parties have no controversy with regard to the Department of Labor regulations cited by either side in this case, the Court notes that opinion letter relied on by HPOU is not entitled to judicial deference as contemplated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court recently held in *Christensen*, "an interpretation contained in an opinion letter[-] . . . like those contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 586. Instead, "interpretations contained in formats such as opinion letters are

language in the statute that indicates Congress intended to impose on public employers the duty to grant its employees the use of comp time, essentially, on demand. Therefore, to the extent that HPOU's partial summary judgment motion focuses entirely on the "undue disruption" prong of § 207(o)(5), the Court finds that such argument lacks merit because it first presumes that police officers are not receiving comp time within a reasonable period of making the request. Because HPOU has presented no competent evidence showing that the City has failed to grant comp time within a reasonable period, and because the record rather demonstrates that the City has satisfied the reasonable-period requirement, the issue of "undue disruption" is largely irrelevant. The Court accordingly grants summary judgment for the City.

IV. CONCLUSION

In this case, HPOU claims that the City violates the FLSA in two different ways. First, it argues that the City's failure to include the equipment allowance into each officer's "regular rate" of pay violates the FLSA because the allowance does not fall into any of the eight enumerated exemptions to the regular rate. The City, however, has satisfied its burden in showing that the equipment allowance in fact satisfies the second exemption to the statute because the equipment allowance reasonably approximates the average expenditures and costs incurred by the officers for equipment on the job. HPOU's second argument regarding the use of specific comp time also fails because HPOU focuses on the "undue disruption" prong of the statute to the disregard of the latitude afforded to municipalities by way of the "reasonable period" language.

'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 587. Here in the instant case, the Court finds unpersuasive the Department of Labor's opinion letter for the reasons assigned above.

Accordingly, the Court

ORDERS that Plaintiffs' motion for partial summary judgment is DENIED; and

ORDERS that Defendant's cross-motion for summary judgment is GRANTED.

SIGNED at Houston, Texas, this 25th day of September, 2001.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Sept. 26, 2001]

Civil Action No. H-00-2184

HOUSTON POLICE OFFICERS' UNION, *et al.*,
Plaintiffs,

vs.

CITY OF HOUSTON POLICE DEPARTMENT and
CITY OF HOUSTON,
Defendants.

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order of this same date, the Court

ORDERS that Defendant City of Houston, Texas is granted summary judgment on all claims brought against it in the above-referenced action by Plaintiff Houston Police Officers' Union et al.; and further

ORDERS that Plaintiffs pay all costs of court.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 25th day of September, 2001.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

APPENDIX E FAIR LABOR STANDARDS ACT OF 1938, § 7(o)-(q), 29 U.S.C.A. § 207(o)-(q)

§ 207 Maximum Hours

* * *

(o) Compensatory time.

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3). In the case of employees described in clause (A)(ii) hired prior to April 1 the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such

clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher [.]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution.

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer,

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education.

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

* * *

APPENDIX F

APPENDIX F—REGULATIONS INVOLVED

29 C.F.R. § 553.20

SECTION 7(o)—COMPENSATORY TIME AND COMPENSATORY TIME OFF

§ 553.20 Introduction.

Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees regarding compensation for statutory overtime hours. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7. Compensatory time received by an employee in lieu of cash must be at the rate of not less than one and one-half hours of compensatory time for each hour of overtime work, just as the monetary rate for overtime is calculated at the rate of not less than one and one-half times the regular rate of pay.

* * *

29 C.F.R. § 553.21

§ 553.21 Statutory provisions.

Section 7(o) provides as follows:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate

governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) Pursuant to—

(i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other such employees; or

(ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) If the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of

compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 1 Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) The final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) Who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) Who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) For purposes of this subsection—

(A) The term *overtime compensation* means the compensation required by subsection (a), and

(B) The terms *compensatory time* and *compensatory time off* means hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

* * *

29 C.F.R. § 553.22

§ 553.22 "FLSA compensatory time" and "FLSA compensatory time off".

(a) Compensatory time and compensatory time off are interchangeable terms under the FLSA. Compensatory time off is paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by section 7 of the FLSA.

(b) The Act requires that compensatory time under section 7(o) be earned at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA. Thus, the 480-hour limit on accrued compensatory time represents not more than 320 hours of actual overtime worked, and the 240-hour limit represents not more than 160 hours of actual overtime worked.

(c) The 480- and 240-hour limits on accrued compensatory time only apply to overtime hours worked after April 15, 1986. Compensatory time which an employee has accrued prior to April 15, 1986, is not

subject to the overtime requirements of the FLSA and need not be aggregated with compensatory time accrued after that date.

* * *

29 C.F.R. 553.23

§ 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime compensation only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-

half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or under-

standing concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however,

such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

* * *

29 C.F.R. § 553.24

§ 553.24 "Public safety", "emergency response", and "seasonal" activities.

(a) Section 7(o)(3)(A) of the FLSA provides that an employee of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, may accumulate not more than 480 hours of compensatory time for FLSA overtime hours which are worked after April 15, 1986, if the employee is engaged in "public safety", "emergency response", or "seasonal" activity. Employees whose work includes "seasonal", "emergency response", or "public safety" activities, as well as other work, will not be subject to both limits of accrual for compensatory time. If the employee's work regularly involves the activities included in the 480-hour limit, the employee will be covered by that limit. A public agency cannot utilize the higher cap by simple classification or designation of an employee. The work performed is controlling. Assignment of occasional duties within the scope of the higher cap will not entitle the employer to use the higher cap. Employees whose work does not regularly involve "seasonal", "emergency response", or "public safety" activities are subject to a 240-hour compensatory time accrual limit for FLSA overtime hours which are worked after April 15, 1986.

(b) Employees engaged in "public safety", "emergency response", or "seasonal" activities, who transfer to positions subject to the 240-hour limit, may carry over to the new position any accrued compensatory time. The employer will not be required to cash out the accrued compensatory time which is in excess of the lower limit. However, the employee must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit.

(c) "Public safety activities": The term "public safety activities" as used in section 7(o)(3)(A) of the Act includes law enforcement, fire fighting or related activities as described in §§ 553.210 (a) and (b) and 553.211 (a)-(c), and (f). An employee whose work regularly involves such activities will qualify for the 480-hour accrual limit. However, the 480-hour accrual limit will not apply to office personnel or other civilian employees who may perform public safety activities only in emergency situations, even if they spend substantially all of their time in a particular week in such activities. For example, a maintenance worker employed by a public agency who is called upon to perform fire fighting activities during an emergency would remain subject to the 240-hour limit, even if such employee spent an entire week or several weeks in a year performing public safety activities. Certain employees who work in "public safety" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.201)

(d) "Emergency response activity": The term "emergency response activity" as used in section 7(o)(3)(A) of the Act includes dispatching of emergency vehicles and personnel, rescue work and ambulance services. As is the case with "public safety" and "seasonal" activities,

an employee must regularly engage in "emergency response" activities to be covered under the 480-hour limit. A city office worker who may be called upon to perform rescue work in the event of a flood or snowstorm would not be covered under the higher limit, since such emergency response activities are not a regular part of the employee's job. Certain employees who work in "emergency response" activities for purposes of section 7(o)(3)(A) may qualify for the partial overtime exemption in section 7(k) of the Act. (See § 553.215.)

(e)(1) "Seasonal activity": The term "seasonal activity" includes work during periods of significantly increased demand, which are of a regular and recurring nature. In determining whether employees are considered engaged in a seasonal activity, the first consideration is whether the activity in which they are engaged is a regular and recurring aspect of the employee's work. The second consideration is whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation during such period of more than 240 compensatory time hours (the number available under the lower cap). Such projections will normally be based on the employer's past experience with similar employment situations.

(2) Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. As an example, employees processing tax returns over an extended period of significantly increased demand whose overtime hours could be expected to result in the accumulation during such period of more than 240 compensatory time hours will typically qualify as engaged in a seasonal activity.

(3) While parks and recreation activity is primarily seasonal because peak demand is generally experienced in fair weather, mere periods of short but intense activity do not make an employee's job seasonal. For example, clerical employees working increased hours for several weeks on a special project or assigned to an afternoon of shoveling snow off the courthouse steps would not be considered engaged in seasonal activities, since the increased activity would not result in the accumulation during such period of more than 240 compensatory time hours. Further, persons employed in municipal auditoriums, theaters, and sports facilities that are open for specific, limited seasons would be considered engaged in seasonal activities, while those employed in facilities that operate year round generally would not.

(4) Road crews, while not necessarily seasonal workers, may have significant periods of peak demand, for instance during the snow plowing season or road construction season. The snow plow operator/road crew employee may be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap.

* * *

29 C.F.R. § 553.25

§ 553.25 Conditions for use of compensatory time ("reasonable period", "unduly disrupt").

(a) Section 7(o)(5) of the FLSA provides that any employee of a public agency who has accrued compensatory time and requested use of this compensatory time, shall be permitted to use such time off within a "reasonable period" after making the request, if such use does not "unduly disrupt" the operations of the agency. This provision, however, does not apply to "other

compensatory time" (as defined below in § 553.28), including compensatory time accrued for overtime worked prior to April 15, 1986.

(b) Compensatory time cannot be used as a means to avoid statutory overtime compensation. An employee has the right to use compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period of his or her making a request for use of such time.

(c) *Reasonable Period.* (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (See § 553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) *Unduly Disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the

employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

* * *

29 C.F.R. § 553.26

§ 553.26 Cash overtime payments.

(a) Overtime compensation due under section 7 may be paid in cash at the employer's option, in lieu of providing compensatory time off under section 7(o) of the Act in any workweek or work period. The FLSA does not prohibit an employer from freely substituting cash, in whole or part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods. (See § 553.23(a)(2).)

(b) The principles for computing cash overtime pay are contained in 29 CFR part 778. Cash overtime compensation must be paid at a rate not less than one and one-half times the regular rate at which the employee is actually paid. (See 29 CFR 778.107.)

(c) In a workweek or work period during which an employee works hours which are overtime hours under FLSA and for which cash overtime payment will be made, and the employee also takes compensatory time off, the payment for such timeoff may be excluded from

the regular rate of pay under section 7(e)(2) of the Act. Section 7(e)(2) provides that the regular rate shall not be deemed to include

> . . . payments made for occasional periods when no work is performed due to vacation, holiday, . . . or other similar cause.

As explained in 29 CFR 778.218(d), the term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, illness, and so forth. Payments made to an employee for periods of absence due to the use of accrued compensatory time are considered to be the type of payments in this "other similar cause" category.

* * *

29 C.F.R. § 553.27

§ 553.27 Payments for unused compensatory time.

(a) Payments for accrued compensatory time earned after April 14, 1986, may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(b) Upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14, 1986, at a rate of compensation not less than—

(1) The average regular rate received by such employee during the last 3 years of the employee's employment, or

(2) The final regular rate received by such employee, whichever is higher.

(c) The phrase "last 3 years of employment" means the 3-year period immediately prior to termination. Where an employee's last 3 years of employment are not continuous because of a break in service, the period of

employment after the break in service will be treated as new employment. However, such a break in service must have been intended to be permanent and any accrued compensatory time earned after April 14, 1986, must have been cashed out at the time of initial separation. Where the final period of employment is less than 3 years, the average rate still must be calculated based on the rate(s) in effect during such period.

(d) The term "regular rate" is defined in 29 CFR 778.108. As indicated in § 778.109, the regular rate is an hourly rate, although the FLSA does not require employers to compensate employees on an hourly basis.

* * *

29 C.F.R. § 553.28

§ 553.28 Other compensatory time.

(a) Compensatory time which is earned and accrued by an employee for employment in excess of a nonstatutory (that is, non-FLSA) requirement is considered "other" compensatory time. The term "other" compensatory time off means hours during which an employee is not working and which are not counted as hours worked during the period when used. For example, a collective bargaining agreement may provide that compensatory time be granted to employees for hours worked in excess of 8 in a day, or for working on a scheduled day off in a non-overtime workweek. The FLSA does not require compensatory time to be granted in such situations.

(b) Compensatory time which is earned and accrued by an employee working hours which are "overtime" hours under State or local law, ordinance, or other provisions, but which are not overtime hours under section 7 of the FLSA is also considered "other" compensatory time. For example, a local law or ordinance may provide that compensatory time be granted to

employees for hours worked in excess of 35 in a workweek. Under section 7(a) of the FLSA, only hours worked in excess of 40 in a workweek are overtime hours which must be compensated at one and one-half times the regular rate of pay.

(c) Similarly, compensatory time earned or accrued by an employee for employment in excess of a standard established by the personnel policy or practice of an employer, or by custom, which does not result from the FLSA provision, is another example of "other" compensatory time.

(d) The FLSA does not require that the rate at which "other" compensatory time is earned has to be at a rate of one and one-half hours for each hour of employment. The rate at which "other" compensatory time is earned may be some lesser or greater multiple of the rate or the straight-time rate itself.

(e) The requirements of section 7(o) of the FLSA, including the limitations on accrued compensatory time, do not apply to "other" compensatory time as described above.

* * *

APPENDIX G

MEET & CONFER AGREEMENT BETWEEN HPOU & CITY OF HOUSTON

Article 33 Non-exempt Officer Compensatory Time Accrual

All non-exempt officers may accumulate up to a maximum of 480 hours of compensatory time. Any hours accumulated in excess of 480 shall be paid automatically as overtime in compliance with all state, local and federal laws. All compensatory time balances that non-exempt officers have on 12-31-01 shall be frozen at the officer's rate of pay (all pay except equipment and clothing allowance) on that date and may be utilized in the normal course of business, paid at retirement or utilized in the Phase Down Program.

1. Compensatory Time Use. An officer who requests to take accrued compensatory time off shall be allowed to do so, provided—

   (a) the request is made no less than seventy-two (72) hours prior to the beginning of the shift during which the time off is to be used; and

   (b) no timely request to use compensatory time off shall be refused unless the refusal is preceded by an effort to find a replacement officer in accordance with the following procedure;

      (i) The "Red Book" currently used to sign up for time off is full under Departmentally established minimum staffing levels. It is expressly agreed and presumed that operation of the Department below these levels would create an undue burden on the delivery of police service during the shift.

      (ii) If the "Red Book" is full, the officer requesting the time off may find a qualified officer desiring to work as a replacement. An officer

may use a replacement for compensatory time off a maximum of two times a month. Any request more than twice a month may be approved or denied by the Department at its sole discretion. An officer may not volunteer as a replacement officer for time during which he or she is otherwise scheduled to work. At the Department's option, time as a replacement officer shall be paid at straight time (base and longevity only) as an assignment pay; or/ will be credited to an officer's compensatory time bank at time and one-half. No officer may volunteer as a replacement for another officer for whom the replacement has volunteered in the previous pay period unless specifically authorized by the shift commander. Replacement officer volunteers are not qualified for straight time pay unless the replacement officer works less than 86 hours in a 14-day pay period. The 86 hour 14-day pay period will apply only to volunteer replacement officers' time. See paragraph (3) below. The Meet and Confer Agreement will continue to set the overtime compensation rules for all other work.

(iii) If no replacement is found under the provisions of section 1(b)(ii) above, the request may be refused but not solely on the basis of pre-established staffing levels. A refusal under these rules will constitute a valid determination that without the officer, the delivery of necessary police services on the day and during the shift would be jeopardized.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 3, 1999]

NO. CV 93-3441-GHK (RNBx)

MICHAEL L. KIMPEL *et al.*,
Plaintiffs,

vs.

WILLIE WILLIAMS *et al.*,
Defendants.

MEMORANDUM AND ORDER

In our June 24, 1998 order, we directed counsel to brief the issue of available remedies for violations of the standards in the Fair Labor Standards Act ("FLSA") governing employee use of compensatory time off ("CTO"). In hearings on October 26, 1998, and October 28, 1998,[1] and through further briefing, counsel have presented their arguments and authorities on the issue. We have considered counsel's briefing, arguments, and the relevant authorities. We rule as follows:

I. INTRODUCTION

The FLSA permits employees of a public agency to receive CTO in lieu of cash overtime payment. 29 U.S.C. § 207(o).

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[1] In the October 28, 1998 hearing and in a written submission filed on November 17, 1996, plaintiffs limited themselves to three theories of liability for violations of the FLSA's CTO provision. 29 U.S.C. § 207(o)(5). This ruling addresses the narrow question of what remedies are available under Theory three.

The public agency can use this CTO option only pursuant to an agreement with representatives of its employees, or with the employees themselves if they do not have representatives. *See* 29 U.S.C. § 201(o)(2)(A). When employees with booked CTO request its use, the employer must acquiesce within a reasonable time if doing so will not unduly disrupt the operation of the agency. *See* 29 U.S.C. § 207(o)(5); 29 C.F.R. § 553.25(d). Defendants have an agreement with plaintiffs' representatives to utilize the statutory CTO provision.

II. PARTIES' POSITIONS

Plaintiffs allege that defendants booked CTO for them, but refused to let them use it in accordance with the FLSA's unduly disruptive standard. This conduct, plaintiffs claim, violates 29 U.S.C. § 207(o)(5), entitling them to remedies pursuant to 29 U.S.C. § 216(b), which provides in pertinent part as follows:

> Any employer who violates the provisions of section 206 or section 201 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216(b). Plaintiffs argue that "unpaid overtime compensation" within the meaning of § 216(b) includes CTO that defendants had improperly withheld from plaintiffs in violation of the unduly disruptive standard. As such plaintiffs should be entitled to, among other things, liquidated damages in a monetary amount equal to the value of the wrongfully withheld CTO.

By contrast, defendants take a literalistic approach to § 216(b). First, they argue that because CTO is paid when it is booked, they have not violated § 207 and, therefore, are not subject to § 216(b) remedies.

Second, they claim that even if there were violations of § 207(o)(5), the remedies set forth in § 216(b) do not apply. More specifically, § 216(b) provides the following two remedies for violations of § 207: 1) the employer shall pay the amount of the "unpaid overtime compensation," and 2) it shall also pay an equal amount in liquidated damages. 29 U.S.C. § 216(b). Defendants argue that "unpaid overtime compensation" refers only to money compensation, not to CTO. Consequently, they argue, plaintiffs necessarily cannot receive the first remedy, i.e., the amount of "unpaid overtime compensation," because plaintiffs have no "unpaid overtime compensation." They only have "unpaid" CTO. Furthermore, plaintiffs necessarily cannot receive the second remedy, i.e., liquidated damages in an equal amount to their "unpaid overtime compensation." If they have "unpaid overtime compensation" in the amount of zero, then an equal amount would be zero liquidated damages. Thus, according to defendants, neither of the § 216(b) remedies—payment of unpaid overtime compensation or of liquidated damages—are available to plaintiffs.

III. DISCUSSION

A. When Is CTO "Paid"?

Defendants argue that CTO is paid when it is booked. Because there is no dispute that CTO was booked, there is no violation of § 207 and § 216(b) remedies are not implicated. We reject this argument. We conclude that CTO is not "paid" when booked.

A simple analogy with money payment reveals the flaw in defendants' argument. Imagine an employer who "paid" her employees by depositing their paychecks in bank accounts that they could only access with her permission, which she agreed she would grant under certain conditions. However, she refused her employees access to their accounts even though the stipulated conditions were met. It would be

strange indeed to characterize these employees as having been paid when the checks were deposited in the accounts. We do not mean to suggest by this analogy that there are no differences between CTO and money payments. *See* discussion *infra* n.2. However, the differences do not undermine the point made by this analogy.

Furthermore, if CTO were paid when booked, the concept of remonetization is rendered incoherent. Employers have the option of remonetizing booked CTO at their discretion. *See* 29 C.F.R. § 553.26(a) (interpreting the FLSA to permit an employer freely to substitute cash for CTO). If CTO were paid when booked, then it makes little sense for any employer to remonetize something for payment which had already been "paid." In light of the foregoing, we conclude that CTO is paid when it is used, not when it is booked.[2]

B. Does "Unpaid Overtime Compensation" Include CTO?

Defendants' next argument is that even if CTO is not "paid" when booked, CTC is not "unpaid overtime compensation" within the meaning of § 216(b) because that provision relates only to unpaid money compensation, not unpaid CTO.[3] This argument presents us with an issue of statutory interpretation. More specifically, we must determine, first, whether the term "unpaid overtime compensation" as it is

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[2] We do not mean to imply that, therefore, all booked CTO is "unpaid," thereby triggering the FLSA's remedies provisions. Booked CTO only becomes "unpaid" when its use is denied in violation of the unduly disruptive standard. See 29 U.S.C. § 207(o)(5).

[3] In support of the contrary position, plaintiffs depend on *Hellmers v. Town of Vestral, New York*, 969 F. Supp. 837 (N.D.N.Y. 1937). However, this proposed authority is not instructive. It is unclear whether the court was applying § 216(b)'s liquidated damages remedy to CTO. In any event, the opinion does not address this precise issue with sufficient specificity to aid our analysis here.

used in § 216(b) refers exclusively to money payments, and, second, if it does not, whether it encompasses CTC.

In accord with traditional principles of statutory interpretation, we look first to the plain meaning of the text. *See Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989). Even if the statutory language has a plain meaning, we properly look beyond the naked text to confirm that this interpretation is consistent with congressional purpose and that it does not lead to anomalous results. *See id.* at 455.

The FLSA neither defines "unpaid overtime compensation" nor restricts it to money payments. The phrase "in the amount of" immediately preceding the phrase "unpaid overtime compensation" in § 216(b) meaningfully applies to CTO as well as money payments. 29 U.S.C. § 216(b). That is, both types of payment, CTO and money, can just as naturally be referred to in terms of "amount."

While § 207(o)(7) cross-referentially provides that "over time compensation" is to be paid at a rate not less than one and one-half times the regular rate at which [the employee] is employed," 29 § 207(a)(1), this language is consistent with including money payment and CTO. Moreover, § 207(o)(1) uses comparable language, including the term "rate," to refer specifically to CTO. 29 U.S.C. § 207(c)(1) (stating that employees may receive "compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section").[4]

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[4] Section 207(o)(1) also states that public agency employees may receive CTO "in lieu of" overtime compensation. At first glance, this language might suggest that CTO is something other than overtime compensation and, therefore, cannot be included in "unpaid overtime compensation" as the phrase is used in § 216(b). According to the dictionary, "in lieu of" means "in place of" or "instead of". *Webster's II New*

All of this analysis is consistent with the plain meaning of "compensation," which is commonly understood as some form of payment for work.[5] Having analyzed the language of the statute itself, we conclude that the plain meaning of "unpaid overtime compensation" as the phrase is used in § 216(b) encompasses CTO as well as money payments.

To confirm this analysis, we next look to legislative history to determine whether our interpretation produces results inconsistant with congressional purpose. First, nothing in the legislative history suggests that Congress meant to preclude violations of the CTO provisions from the full range of remedies in § 216(b). *See* S. Rep. No. 159, 99th Cong., 1st Sess. 1 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651; H.R. Conf. Rep. No. 357, 99th Cong., 1st Sess. 1 (1985), *reprinted in* 1985 U.S.C.C.A.N. 668. Second, according to the legislative history, Congress' purpose in 'providing a CTO option' to certain public agencies is to permit them a viable alternative means of compensation that does not require immediate money payment. *See* S. Rep. No. 159, at 8, 1985 U.S.C.C.A.N. at 655-56; HR. Conf. Rep. No. 357, at 9, 1985 U.S.C.C.A.N. at 670. Most importantly, by explicitly providing the CTO option, Congress revealed its intention that it be a genuinely viable option, i.e., one that could be used. Thus, any interpretation of the statute that undermines its use would, all other things being equal, be disfavored.

Riverside Dictionary 691 (1994). In other words, when object A stands in lieu of object B, A is the functional equivalent of B. Thus, this language suggests that, within the context of the FLSA, CTO is the functional equivalant of "overtime compensation." At the very least, this language is not inconsistent with "unpaid overtime compensation" encompassing CTO and money payments.

[5] The dictionary, one indicator of common usage, defines "compensation, in pertinent part, as "[s]omething given or received as payment or reparation, as for goods, services, or loss." *Webster's II New Riverside Dictionary* 290 (1994).

Defendant's interpretation of § 216(b) undermines potential use of the CTO option. If "unpaid overtime compensation" only refers to money payments, then conversion of remuneration into CTO leaves plaintiffs with fewer remedies than would be available if there had been no conversion. That is, in a private action, plaintiffs' relief is a declaratory judgment,[6] but not liquidated damages pursuant to § 216(b). A mere declaration that defendants' conduct violates § 207(o)(5) falls far short of the enforcement power of a liquidated damages remedy.

Also, in light of legislative history, we cannot interpret § 216(b) to limit the remedies an employee has when compensated with CTO. The purpose of the statute was to give public agencies short on cash an alternative means of providing overtime compensation. The purpose was not to protect public agencies that violated the FLSA from the full range of remedies that would have been available if they had compensated their employees in money instead of CTO. If that were Congress' purpose, it could have explicitly exempted violations of § 207(o)(5) from any or all remedies pursuant to § 216(b). Congress did not do so.

Finally, defendants' argument is also not supported by any persuasive policy reasons. To the contrary, this interpretation

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[6] Defendants argue that the only FLSA remedy available to plaintiffs in a private civil action is attorneys fees. 29 U.S.C. § 216(b). For further relief, defendants claim that plaintiffs must go outside the FLSA to the general declaratory relief statute. 28 U.S.C. §§ 2201(a), 2202. However, a mere declaration by the court is a largely hollow remedy in the absence of some form of enforcement mechanism. Other remedies, such as injunctive relief or administrative penalties, require intervention by the Secretary of Labor or other administrative representatives and are unavailable in a private action, as here. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); 29 C.F.R. §§ 578.3-578.4, 580. Without the potential coercive power of an injunction, a mere declaration is simply an expression of the court's opinion without any effective means of enforcement.

leaves open a potential abuse of the CTO option that would undermine its long-term viability as an alternative to money payment.

If liquidated damages were only available when unpaid overtime compensation was in the form of money payments, then employers could convert money payment into CTO to avoid the penalty. Once converted, the employer could flout the unduly disruptive standard without fear of penalty unless and until the Secretary of Labor intervened with a request for an injunction.[7] Even after being caught, the employer could remonetize the CTO, pursuant to 29 C.F.R. § 553.26(a), and pay it back at the rate at which the employee is being paid at the time of the payback. However, this additional cost is likely to be modest in comparison to the remedy of § 216(b), which provides for the payment of 1) the unpaid overtime compensation and 2) an additional equal amount as liquidated damages.[8] 29 U.S.C. § 216(b).

If we interpreted § 216(b) so that such "laundering" were possible, then it would not be long before employees realized that it was in their interest to refuse to agree to accept CTO in lieu of money payment for overtime. Without employee agreement, public agencies could not use the CTO option. *See* 29 U.S.C. § 207(o)(2). Thus, defendants' interpretation of the statute would undermine the very option Congress endeavored to provide.

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[7] Furthermore, employees in this situation have no guarantee that the Secretary of Labor will intervene.

[8] By providing this hypothetical we do not mean to suggest that defendants engaged in such conduct. We have no occasion to reach any such determination at this time. Instead, we provide this illustration to demonstrate how defendants' proffered interpretation is inconsistent with congressional purpose.

IV. CONCLUSION

The plain meaning of "unpaid overtime compensation" as used in § 216(b) includes CTO withheld in violation of § 207(o)(5). We reject defendants' interpretation of § 216(b) and conclude that liquidated damages are available as a remedy for violations of § 207(o)(5).

IT IS SO ORDERED.

Dated: This 3rd day of February 1999.

/s/ George H. King
GEORGE H. KING
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 98-11955-MEL

JOHN J. CANNEY, *et al.*,
Plaintiffs,

v.

TOWN OF BROOKLINE and BROOKLINE POLICE DEPARTMENT,
Defendants

LASKER, D.J.

John Canney and 125 other Brookline Police Officers (the "police officers" or "officers") allege that payment practices of their employer, the Town of Brookline and its Police Department (collectively, the "town") violate the Fair Labor Standards Act ("FLSA").[1] Pursuant to a settlement agreement, the parties have resolved most of the issues in this case. There remains the question whether the town may refuse to grant an officer's request to use "compensatory time" because to do so the town would have to pay another officer overtime. Both parties move for summary judgment on this issue. The town's motion is denied. The police officers' motion is granted in part and denied in part.

The FLSA requires an employer to pay its workers who are covered under the statute in cash, at the rate of time and one-half, for overtime work. Section 207(o) of the FLSA, with some restrictions, permits a public employer to compensate its employees in paid time off (compensatory time) instead of cash overtime.

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[1] Fair Labor Standards Act of 1938, (codified as amended in 29 U.S.C. §§ 201-219).

The precise question for decision is whether the need to pay one officer overtime to allow another officer to use compensatory time constitutes an "undue disruption" as this term is used in 29 U.S.C. § 207(o)(5) and is interpreted in 29 C.F.R. § 553.25(d). Section 207(o)(5) provides that an employee who asks to use accrued compensatory time:

> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of compensatory time does not *unduly disrupt* the operations of the public agency.

29 U.S.C. § 207(o)(5) (emphasis added).

In 29 C.F.R. § 553.25(d), the DOL has clarified the meaning of "undue disruption" contained in § 207(o). It provides:

> (d) *Unduly disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H.Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

The payment of one officer overtime to allow another officer to use compensatory time does not constitute an "undue disruption." On the present record nothing indicates that having to pay one or more officers overtime in cash, to permit another officer to take compensatory time would effect the police department's "ability to provide services of acceptable quality and quantity."

The DOL concurs in this reading of the statute and applicable regulation. See 52 Fed. Reg. 2012, 2017 (1987); April 21, 2000, Amicus Brief of the DOL in *Debraska v. Milwaukee*; DOL FLSA opinion letter, 1994 WL 1004861. The DOL's interpretation is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694(1984) (court's must give effect to an agency's regulation containing a reasonable interpretation of a statute); *Auer v. Robbins*, 519 U.S. 452, 461-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (agency's interpretation of its own regulation is entitled to deference). Despite the town's argument to the contrary, nothing in *Christensen v. Harris County*, 529 U.S. __, 120 S. Ct.1655, __ L. Ed. 2d __ (2000) changes this result.

The affidavits submitted by the parties do not establish whether the town, in fact, prohibited any officers from using compensatory time because it would result in hiring other officers at overtime rates. Whether the town engaged in this practice, and on how many occasions, remains an open question of fact.

The defendants' motion for summary judgment is denied. The plaintiffs' motion for summary judgment is granted in part and denied in part.

It is so ordered.

Dated: October 9, 2000
Boston, Massachusetts

/s/ Morris E. Lasker
MORRIS E. LASKER
U.S.D.J.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed May 10, 2001]

CV 99-13090 FMC (JWJx)

LONG BEACH POLICE OFFICERS' ASSOCIATION, *et al.*,
Plaintiffs,

vs.

ROBERT M. LUMAN, *et al.*,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT; ORDER DISMISSING PLAINTIFF LONG BEACH POLICE OFFICERS' ASSOCIATION

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment filed on November 2, 2000. For the reasons stated herein, Plaintiff's Partial Motion for Summary Judgment is hereby GRANTED IN PART AND DENIED IN PART.

I. Background

This action arises out of the City of Long Beach Police Department's ("the Department's) policy of compensating officers for overtime with compensatory time off in lieu of cash payment as permitted by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*. Specifically, a dispute has arisen between individual police officers and the

Department regarding under what circumstances a police officer's request to take compensatory time off will be granted.

The Long Beach Police Officer's Association ("the Association"), the police officers' employee representative, and Michael Schaich, the original Plaintiffs in this action, have been joined by 334 other Long Beach police officers ("the 334 officers"). These police officers have filed consents to participate in the litigation pursuant to 29 U.S.C. § 206(b).

A. The Policy—Compensatory Time in Lieu of Cash Payment

The City of Long Beach personnel ordinances authorize the Department to provide an employee with compensatory time off in lieu of cash payment for overtime worked. Compensatory time accrues at the rate of one and one-half hours for each hour of overtime worked.

It is the policy of the Department to grant a police officer's request for use of compensatory time off unless the use of compensatory time by the officer would cause the staffing levels to fall below established minimum standards.[1] (King Decl. ¶ 4). This policy was incorporated into the memorandum of understanding ("MOU") between the Association and the Department.[2]

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[1] Jerome Lance, Chief of Police, explained the rationale for the minimum staffing levels in his declaration. These levels ensure that the City of Long Beach has a sufficient number of police officers on duty at all times and ensures that the Department will be able to respond to calls for service within a specified time period based on the priority of the call (e.g., five minute response time for felony spouse beating in progress). (Lance Decl. ¶ 2).

[2] The MOU provides:

It is agreed that there exists within the Police Department personnel policies and procedures, general orders, departmental policies and rules and regulations. Except as specifically modified by this MOU, these rules

Beginning in April 1999, the Department adopted a policy of attempting to grant requests to take compensatory time off by finding another officer to cover the requesting officer's shift.[3] (Lacey Depo. at 30-31). This attempt was made by the scheduling sergeant independently or by the scheduling sergeant with the assistance of the requesting officer. (Lacey Depo. at 30-31). Prior to April 1999 time, there was no such policy. (Lacey Depo. at 31, 37).

B. The Denied Requests—Police Officers Schaich and Bacon

1. Officer Schaich

On or about March 11, 1999, Officer Schaich requested four days of compensatory time off for the days March 29, 30, 31, and April 1 (Schaich Decl. ¶ 3).[4] Kevin King, Scheduling Sergeant assigned to Watch I of the East Patrol Division

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and regulations, and policies and subsequent amendments thereto shall be in force and effect during the term of this MCU. Before any new or subsequent amendments to these policies or departmental rules and regulations directly affecting wages, hours, terms and conditions of employment are implemented, the City, through the Police Chief, shall meet in accordance with Government Code Section 3500, et seq., with the Association regarding such changes.

[3] The Department argues that Commander Lacey's testimony regarding this issue should not be considered because it is an answer to a hypothetical question. To the contrary, Commander Lacey's testimony merely explains a possible application of a departmental policy that is at the heart of the present controversy.

[4] The Department has objected to paragraphs three and four of Officer Schaich's declaration on the bases of relevancy, lack of foundation, and because the declaration sets forth a legal conclusion. The Court sustains the Department's objection to the fourth paragraph of Officer Schaich's declaration, which indeed sets forth a legal conclusion. Conversely, the third paragraph of Officer Schaich's declaration regarding his request to take compensatory leave is relevant, does not lack foundation, and is not a legal conclusion; therefore, the Court overrules the Department's objection to the third paragraph of the Declaration.

of the Department at the time of the request, reviewed Officer Schaich's request to use compensatory time and determined that granting Officer Schaich all four days requested would cause the staffing levels fall below the Department's minimum standards. (King Decl. ¶¶ 2, 4, 5). Sergeant King informed Officer Schaich that he could grant his request with respect to three of the four days, but not all of the days requested. (King Decl. ¶ 5). Officer Schaich informed Sergeant King, however, that if he could not have off all four days, he did not want to take any days off; therefore, Sergeant King denied the request in its entirety. (King Decl. ¶ 5).

Officer Schaich claims that he provided Sergeant King with the names of four officers who could work his scheduled shifts on the four days in question. (Schaich Decl. ¶ 3). Sergeant King disagrees with this statement and denies that names were ever offered or provided. (King Decl. ¶ 7).

2. Officer Bacon

On March 19, 2001, Officer Bacon requested to take a day of compensatory time off to be used on April 8, 2001. (Bacon Decl. ¶ 3). This request was denied. (Bacon Decl. ¶ 3). The following day, Officer Bacon resubmitted the request along with the name of another officer would work the shift in his place. (Bacon Deci. ¶ 4). The request was again denied, but Officer Bacon was given the option of trading scheduled days off with another officer. (Bacon Decl. ¶ 5). Officer Bacon worked his shift on April 8, 2001. (Bacon Decl. ¶ 7).

C. The Present Motion

Plaintiffs argue that the undisputed facts establish that summary judgment should be granted in their favor as to the issue of whether the Department's policy on the use of compensatory time violates § 207(o)(5). The Department argues that the Association is not a proper party to this action, and that the 334 officers are not proper parties to this action because Plaintiffs counsel has not brought a motion to include

them. Therefore, the Department argues, the only issue presented by the present action is whether the Department violated § 207(o)(5) when it denied Plaintiff Michael Schaich's request to use compensatory time.

II. The Association's and the 334 Officers' Status as Parties to This Action

The Department argues that the Association is not a proper party to this action. The Department relies on *State Nevada Employees' Association, Inc. v. Bryan*, 916 F.2d 1384, 1391 (9th Cir. 1990), which indeed held that an employee's representative is not a proper party in an action alleging a violation of 29 U.S.C. § 207(o). Accordingly, the Court hereby *dismisses* the Association from this action.

The Department next argues that the 334 officers are not proper parties to this action because Plaintiff's counsel has not filed a motion pursuant to 29 U.S.C. § 216(b) to include them. However, the 334 officers fled their consents on June 30, 2000, and the Court acknowledged the filing of these consents on July 11, 2000.[5] Defendants' counsel indicated that he had anticipated filing objections to the joining of the 334 officers to this action; however, all a prospective plaintiff need do to "opt in" to FLSA suit for damages is to file a consent pursuant to 29 U.S.C. § 216(b). *See, e.g., Does I Through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000); *Bonilla v. Las Vegas Cigar Co.*, 61 F. Supp.2d 1129 (D. Nev. 1999). Accordingly, the 334 officers are proper plaintiffs in this action.

III. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

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[5] Apparently, neither party received a copy of this filing. A copy was provided to counsel at the hearing on the present Motion on May 7, 2001.

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro, 56(c); *see also Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir.1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party. *Anderson,* 477 U.S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir.1995).

IV. Compensatory Time Off Under the FLSA

A. Authorization for Compensatory Time Off in Lieu of Cash Payment for Overtime

Generally, the FLSA requires that employees who work more than forty hours in a week be compensated at a rate of one and one-half times their hourly rate of pay for each hour worked over forty hours in that week. 29 U.S.C. § 207(a)(1). However, the FLSA permits governmental agencies to

provide employees with compensatory time off in lieu of cash payment for overtime:

> (o) Compensatory time
>
> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

29 § 207(o)(1). The governmental agency may provide employees with compensatory time off only pursuant to a collective bargaining agreement or memorandum of understanding. 29 U.S.C. § 207 (o)(2)(A)(i).

B. Employees' Requests to Use Overtime

The FLSA also addresses an employee's request to use compensatory time. Generally, an employee's request must be honored unless the use of the compensatory time unduly disrupts the operations of the public agency:

> (5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not *unduly disrupt* the operations of the public agency.

29 U.S.C. § 297(o)(5) (emphasis added). The term "unduly disrupt is defined by Department of Labor Regulations:[6]

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[6] This Court is required to give deference to an agency's regulation containing a reasonable interpretation of an ambiguous statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

> When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off . . . . For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.23(d). The Department of Labor, in an August 19, 1994, Letter Ruling, provides more guidance as to when granting a request for compensatory time off would be "unduly disruptive," would be an "unreasonable burden," and would be more than a "mere inconvenience":[7]

> It is our position that . . . an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. *The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.*

U.S. 837, 842-44, 104 S. Ct. 2778 (1984); *Christensen v. Harris County*, 529 U.S. 576, 586-87, 120 S.Ct. 1655 (2000).

[7] An agency's interpretation of a regulation should be given deference if the language of the regulation is ambiguous and the interpretation is consistent with the statute. *Auer v. Robbins*, 519 U.S. 45,117 S. Ct. 905 (1997); *Christensen v. Harris County*, 529 U.S. 576, 120 S. Ct. 1555 (2004). The terms "unduly disruptive," "unreasonable burden," and "mere inconvenience" are ambiguous and therefore the agency's interpretation as set forth in its August 19, 1994, Letter Ruling must be given deference.

Department of Labor, Letter Ruling, August 19, 1994 (emphasis added).

V. Analysis

The Department has a policy that provides compensatory time off to its employees in lieu of cash payment, and that policy is incorporated into its MOU with the Association. *See* 29 U.S.C. § 207(o)(1)-(2). Accordingly, the Department is subject to the requirement that employee's requests for use of accrued compensatory time be granted unless such request is unduly disruptive. *See* 29 U.S.C. § 207(o)(5). This Court is required to give deference to the Department of Labor's regulations that define the term "unduly disruptive." *See Chevron*, 467 U.S. at 842-44. Those regulations state that a mere inconvenience to the employer is not to be considered "unduly disruptive" and that requests for compensatory time off should be granted unless the employee's absence would impose an unreasonable burden on the agency's ability to provide services of an acceptable quality and quantity to the public. 29 C.F.R. § 553.23(d). The Department of Labor ("DOL") has interpreted this regulation to require employers to attempt to meet their staffing needs through other means, in order to grant a request for compensatory time off. (08/14/94 Letter Ruling). Specifically, the DOL has interpreted this provision to mean that if the only disruption in the employer's ability to meet its staffing levels consists of the fact that the substitute officer would be working on overtime, the employer may not deny the request for the compensatory time off. *Id.*

Under this standard, the Court agrees with the Department that granting an employee's request for compensatory time off is not required when that employee's absence would cause staffing to fall below the Department's established minimum level. Plaintiffs have presented no evidence that questions the

legitimacy or necessity of maintaining these levels,[8] and the Court has no difficulty concluding that the Department need grant no request for compensatory time off when that action would endanger the safety of the public it is charged with protecting. Such a result would surely be "unduly disruptive" within the meaning of § 207(o)(5).

The issue, then, centers whether the Department, when considering an employee's request to take compensatory time off, is required to determine whether its staffing needs could be met in some other fashion. Plaintiffs have suggested that where an employee has provided the names of officers who are both able and willing to work the requesting officer's shift, then the request must be granted. The uncontroverted facts establish that prior to April, 1999, the Department had no policy of either attempting to find another officer to fill the requesting officer's shift or of allowing the requesting officer to find another officer to fill the shift.

Therefore, the uncontroverted facts establish that the Department's failure to adopt a policy to implement the requirements of the FLSA prior to April 1999 was in violation of § 207(o)(5).[9]

The Department's post-April 1999 policy is articulated by Commander Lacey in his deposition. Commander Lacey explained that beginning in April 1999, the Department adopted a policy of attempting to grant requests to take compensatory time off by finding another officer to cover the

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[8] Indeed, Plaintiffs do not suggest that compensatory time off should be granted if this action causes the staffing levels to fall below the minimum standard.

[9] Whether Officer Schaich submitted the names of four officers who were willing to cover his shifts on March 29, 30, 31, and April 1 is disputed by the parties. This dispute is immaterial, however, because the uncontroverted facts establish that, under the Department's established policy, these officers would not have been considered as possible substitutes for Officer Schaich's shifts. (Lacey Depo. at 37).

requesting officer's shift. This policy, as articulated, would not violate § 207(o)(5).

However, other evidence offered by Plaintiff supports an inference that this policy was not in every instance followed. Officer Bacon's declaration indicates that he requested a day of compensatory time off and provided the name of another officer who could work his shift for him. Under the Department's policy as articulated by Commander Lacey, this request should have been granted. However, the request was denied, and the notation that Officer Bacon could instead trade days off with another officer supports an inference that the policy articulated by Commander Lacey was not followed in this instance.

Accordingly, material issues of fact exist that preclude summary judgment regarding whether the post-April 1999 policy, as applied, violates § 207(o)(5).

VI. Effect of United States Supreme Court Decision in *Christensen*

Defendants correctly note that the United States Supreme Court has stated that the use of compensatory time is not under the exclusive control of the employee and that an employer has significant control over the use of accrued compensatory time. *See Christensen v. Harris County*, 529 U.S. 576, 586 n.5, 120 S. Ct. 1655 (2000) (rejecting, in dicta, a notion that compensatory time should be treated like employee "cash in the bank" under the exclusive control of the employee). However this acknowledgment by the Supreme Court does not alter the requirement under 29 U.S.C. § 207(o)(5) that an employee's request must be honored unless it would unduly disrupt the employer's operations. *See id.* (noting that examples of the employer's control were the ability to "buy out" accrued compensatory time and the ability to deny use of accrued compensatory time when such use would unduly disrupt the employer's

operations). Therefore, *Christensen* does not compel a result contrary to that reached by this Court in resolving the present Motion.

VII. Conclusion

For the reasons stated herein, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment with respect to claims that arose prior to the April 1999 implementation of a policy regarding substitution of officers to facilitate use of compensatory time. The Court hereby DENIES Plaintiff's Motion for Summary Judgment with respect to claims that arose after the April 1999 implementation of the substitution policy.

DATED this 9th day of May, 2001.

/s/ Florence-Marie Cooper
Florence-Marie Cooper, Judge
United States District Court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

[Filed Aug. 10, 2001]

No. 5:99-CV-324-BO(3)

CHRISTOPHER C. MEYER, JOHN ERIC GRAY, DAN JONES, CHARLES L. LYNCH, JAMES NIDIFFER, and CHARLES ROSA,
Plaintiffs,

v.

THE CITY OF RALEIGH,
Defendants.

ORDER

This matter is before the Court on Plaintiffs' Motion to Add 17 Consenters pursuant to 29 U.S.C. § 216(b), Motion to Exceed Page Limitation, and Motion for Partial Summary Judgment and on Defendant's Motion for Summary Judgment. The underlying complaint alleges violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Plaintiffs claim that the employment practices of Defendant City of Raleigh (the "City") violated the FLSA with regards to overtime compensation, the use of compensatory time, and in its calculation of the "regular rate" of pay. Plaintiffs also claim that the City improperly classified sergeants as "exempt" employees under the FLSA when, in fact, sergeants should be classified as "non-exempt" employees.

FACTS

The City of Raleigh operates a police department, in which Plaintiffs Gray, Jones, Lynch, Nidiffer, and Rosa are

currently employed as police officers. Plaintiff Meyer was also a police officer in Raleigh, but has since left the City's police department for different employment. Plaintiffs are all "non-exempt" employees, meaning that they are all subject to the employment requirements of the FLSA.

All police officers who work for the City operate on a 28-day work cycle (the "Cycle") during which they are scheduled to work 168 hours. Plaintiffs are paid a certain salary each work cycle, which includes compensation for nine minutes of pre-roll call time for weekday platoons and 21 minutes of pre-roll call time for the weekend platoons. Officers in a weekday platoon are thus paid to work 8.4 hours per day. If any officer works more than 178 hours during a Cycle, he will be compensated at a rate of one and a half times his hourly rate. In order for a City police officer to receive overtime pay, the officer fills out a form that documents the overtime and requests payment for the overtime hours.

The City and its police officers have entered into an agreement, as provided for under FLSA, by which the officers agree to accept either compensatory time off ("comp time") or overtime pay as compensation for working overtime. *See* Def. Memo. in Supp. at 2. However, the City has placed a 70-hour limit on the amount of comp time that may be accrued. All employees of the City are subject to this limit. Therefore, if an officer has accrued close to 70 hours of compensatory time in one Cycle, he may be required to take time off so as to avoid exceeding the 70-hour cap.

Employees' requests to use their banked comp time are granted on a first-come, first-served basis and are made using a sign-in procedure, by which officers must record their requests in a "leave book". If the leave book is full on a particular day on which an officer seeks to use his comp time, the officer may not take leave that day. The leave book is generally deemed "full" whenever there are one or two

officers from each squad, or six officers from a platoon, already taking the day off. When the leave book is full, the City will not allow a police officer to seek a replacement, if working that day would cause the replacement officer to incur overtime payment. See Knox Depo. at 50.

ANALYSIS

1. Plaintiffs' Motion to Add 17 Consenters

The FLSA allows similarly situated employees to participate in FLSA litigation against their employer by consent. 29 U.S.C. § 216(b). This consent policy promotes judicial efficiency, allowing identical FLSA cases to be heard at once if the employees so desire. All seventeen (17) consenters have indicated their desire to join the current litigation by filing consent forms with this Court.

The Court's deadline for Plaintiffs to file motions to join additional parties expired on September 1, 1999. Discovery closed on May 10, 2000. On August 11, 2000, the magistrate judge granted Defendant's Motion for Sanctions on account of Plaintiffs failure to comply with discovery deadlines. Plaintiffs filed summary judgment motions on July 24, 2000.

Given the tardiness of the instant motion, Defendant might otherwise be prejudiced by the addition of 17 consenters. The City does not oppose this motion, however, but does ask that certain conditions be imposed. This Court will therefore allow the additional consenters to join in the current action, so long as: (1) the consenters are bound by the Amended Answer and discovery served or conducted by Defendant; and (2) the consenters are subject to this Court's ruling on August 11, 2000, which was entered upon Defendant's Motion for Sanctions.

Given that Defendant does not object to the addition of the consenters, this Court will allow the additional consenters to join the suit, subject to the above limitations.

2. Motion to Exceed Page Limitation

On July 24, 2000, Plaintiffs filed a Motion to Exceed Page Limitation with respect to Plaintiffs' Motion and Memo randum in Support of Plaintiffs' Motion for Partial Summary Judgment. Under Local Rule 5.05, the memorandum in support of a motion shall not exceed 30 pages in length. Plaintiffs' proposed memorandum, however, is 36 pages long. Given the number of issues addressed in Plaintiffs' memorandum, the complexity of those issues, and the fact that Defendant does not object to the Motion, this Court finds it proper to grant Plaintiffs' Motion to Exceed the Page Limitation.

3. Motions for Summary Judgment

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Federal. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A moving party is entitled to summary judgment when the record, taken as a whole, could not lead a rational trier of fact to find for the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). In considering a motion for summary judgment, the Court must view the facts and the inferences drawn from the facts in the light most favorable to the nonmoving party. *See id.* at 587-88.

Both Plaintiffs and Defendant have moved for summary judgment on a number of issues, many of them overlapping. This Court will address each issue in turn.

3(A). Defendant's Motion for Summary Judgment on the Basis of the Admissions

Defendant first moves for summary judgment on the basis that all of Plaintiffs' claims are barred by Plaintiffs' first set of admissions. On December 16, 1999, Defendant served its first request for admissions on Plaintiffs. Because Plaintiffs

failed to respond within 30 days after they were served by mail, and failed to withdraw their admissions thereafter, Defendant's requests were automatically admitted. *See* Fed. R. Civ. P. 36(a). Nonetheless, in spite of Defendant's claims to the contrary, the first set of admissions fails to establish any of Defendant's defenses as a matter of law.

First, Defendant requested that Plaintiff admit that "since March 15, 1996, the City has properly compensated [Plaintiffs] under the FLSA." However, this request requires that the Plaintiffs make a conclusion of law. It is well-settled that requests for admissions cannot be used to compel an admission of a conclusion of law. *See Reliance Ins. Co. v. Marathon LeTourneau Co.*, 152 F.R.D. 524, 525 (S.D. W.Va.1994). Therefore, this admission request is invalid under Rule 36(a) and may not be applied against Plaintiffs.

The second admission at issue, that "[Plaintiffs] are credited for time worked prior to the start of roll call" also fails to refute Plaintiffs' claim. Consistent with the admission, Plaintiffs agree that they were credited for nine minutes of time worked prior to the start of roll call. Nonetheless, Plaintiffs claim that, although they were credited with some work prior to roll call, they are nonetheless entitled to more compensation than they have been receiving. Therefore, Plaintiffs' claim of compensation for additional pre-roll call time is not barred by the admission that they have been credited with some pre-roll call hours.

Similarly, admissions two, three, and five, which state that Plaintiffs work on a 28-day cycle, executed a compensatory time agreement with the City and have accumulated no more than 480 hours in the comp time bank, fail to refute any of Plaintiffs claims. None of Plaintiffs' claims is based on any allegations that are inconsistent with these admissions.

Lastly, although Plaintiffs admitted that the City's "Standard Operating Procedure" concerning overtime complies with the FLSA, this admission does not refute Plaintiffs'

claim. As an initial matter, this admission requires a conclusion of law and is therefore invalid. Moreover, even if it is accepted, the admission fails to refute Plaintiffs' claim regarding overtime compensation. Rather than claiming that the City's "Standard Operating Procedure" fails to comply with the requirements of the FLSA, Plaintiffs claim that the Procedure, as it is applied by Defendant in practice, is non-compliant. Therefore, their claim is not barred by the admission that the "Standard Operating Procedure" is compliant with FLSA. In any event, the admission is invalid and need not be applied against Plaintiffs.

For these reasons, Plaintiffs' admissions do not refute any of Plaintiffs' claims as a matter of law. Accordingly, Defendant is not entitled to summary judgment on the basis of Plaintiffs' first set of admissions and its Motion for Summary Judgment on that basis must be denied.

3(B). Plaintiffs' and Defendant's Motion for Summary Judgment on the issue of Compensation for Pre-Shift Work

Plaintiffs' first claim is that Defendant failed to compensate its officers for pre-roll call work. Although the City compensates officers for nine minutes of pre-roll call time during the week and 21 minutes of pre-roll call time on the weekends, Plaintiffs claim that they perform more than nine or 21 minutes of work prior to roll call.

Officers Jones, Liptak, Lunch, Nidiffer, and Rosa stated in deposition testimony that they arrived anywhere from fifteen to forty minutes prior to roll call. *See* Jones Dep. at 18 (an average of 30 minutes early); Liptak Dep. at 4 (from 20 to 30 minutes early); Lynch Dep. at 28 (from 25 to 40 minutes prior to roll-call); Nidiffer Dep. at 74; Rosa Dep. at 38. Plaintiffs stated that they had to arrive early in order to perform various tasks, including: (1) putting gas in their law enforcement vehicle; "restocking" their vehicle with flares and other safety devices; (2) obtaining reports to be used during the day; (3)

viewing the bulletin board; (4) signing out warrant folders; and (5) getting bags together. *See id.*

Plaintiffs claim that the police department had an "unwritten rule" that required them to come in more than nine (or 21) minutes prior to roll call. Officer Nidiffer states that "they'll tell you, 'you need to be here, because sometimes we start roll call at six-forty.' . . . So you need to be there at least by six-thirty. And some guys get there early--earlier than that and get their cars and go through their warrants or whatever." *See* Nidiffer Dep. at 20. According to Officer Lynch, "you are pretty much required to be in far ahead of [roll call] to . . . take care of . . . getting your work packet . . . looking at the bulletin board, getting any information off [the board], getting your bags . . . because they want you as soon as roll call is over to be on the street instead of doing things like that." *See* Lynch Dep. at 27-28. Another officer claimed that one would be "looked upon as not being prompt" if he did not show up more than 15 minutes early.[1] *See* Rosa Dep. at 38. Another stated that it was an "unwritten rule" that officers come in at least fifteen minutes early. *See* Rosa Dep. at 45-46.

Defendant claims that it sufficiently compensates its officers for their pre-roll call "work" by paying them for nine minutes of pre-roll call time on the weekdays and 21 minutes on the weekends. Defendant argues that, although Plaintiffs may do some work-related activities prior to roll call, Plaintiffs also engage in socializing and car-parking, which are not compensable activities. *See* Jones Dep. at 20 (stating that he does use some of his pre-roll call time to socialize with other officers); Lynch Dep. at 60 (stating that he

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[1] At least one officer was commended, in his annual evaluation, "[for] repor[ing] for duty well in advance of his assigned shift and utilizing this time to prepare himself for duty by obtaining needed equipment from his locker, signing out his warrant packet and reviewing informational bulletin boards/shift assignment rosters." *See* July 14, 1999 Evaluation of Officer Jones ¶ 5.

socializes during the ten minutes before the shift); Nidiffer Dep. at 78-79 ("Yeah, sure [I talk with other officers prior to roll call]. I mean, you don't just go into the station and not say hi to anybody. I mean, this is really about the only time you get to . . . talk about cases that are going on . . . or what's happening."). Defendant claims that the pre-roll call work takes less than nine (or 21) minutes and that Plaintiffs have therefore been adequately compensated therefor.

Defendant also argues that there is no rule, unwritten or otherwise, that requires that Plaintiffs come to work early. *See* Def. Memo. in Supp. at 13 (stating that "the City does not require the Plaintiffs to come in before roll call" and that "there are no duties that an officer is required to perform prior to roll call."). Defendant does not agree that Plaintiffs and other officers are "suffered" to work any amount of time prior to 6:45 a.m., when they are, in fact, required to report for the day.

Whether the officers' pre-roll call, work-related activities should be compensated is an issue of law for the court. Under FLSA, employers must pay overtime for "employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). By not providing a definition of "work" or "employment" in the FLSA, Congress left it to the courts to determine which employment-related activities are "work" and, therefore, compensable under the Act. Courts generally construe "work" to include those activities that are "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." *Tennessee Coal, Iron & R. Co. v. Muscoda*, 321 U.S. 590, 598, 64 S. Ct. 698, 703.

Under applicable regulations, "compensable hours of work" include time during which the "employee is suffered or permitted to work for the employer." *See* 29 C.F.R. § 553.221(b). The regulations further states that "such time

includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses." *Id.*

This Court finds that the officers' pre-roll call duties, including the signing out of warrant packets, the re-fueling and re-stocking of law enforcement vehicles, and obtaining information off of the station's bulletin board, qualify as "integral" to the principal activity of law enforcement, in that they must be done prior to the commencement of daily law enforcement duties.[2] At the same time, activities such as socializing and car-parking are not compensable "work" under the FLSA.

Therefore, issues of fact remain which preclude summary judgment. First, an issue of fact remains as to whether, when all of the non-compensable activities are removed from the calculation, including socializing and car-parking, the officers perform more than nine minutes (on weekdays) or 21 minutes (on weekends) of work prior to roll call. If such duties do require more than nine (or 21) minutes of activity, Plaintiffs have worked time for which they have gone uncompensated. However, if the majority of the time is spent socializing, and only nine minutes of work is actually performed prior to roll call, the City's practice of compensating for nine minutes of pre-roll call time would be sufficient.

Second, an issue of fact remains as to whether there exists an "unwritten rule" by which officers are required to report at least fifteen minutes prior to their official "report" or "roll call" time. If there exists such a rule, then Plaintiffs could be said to have "suffered" work for the benefit of the City for

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[2] Moreover, because the officers must be "on the street" subsequent to the roll call, time spent prior to roll call engaging in such integral activities is compensable time.

which they have gone uncompensated. These are both issues of fact that must be left to the fact-finder and, therefore, preclude summary judgment.

3(C). Compensation for Post-Shift Work

Plaintiffs also claim that they were not compensated for post-shift work. The City's overtime work compensation scheme required officers to submit overtime forms in order to request compensation for the amount of overtime that they had done. In practice, however, Plaintiffs claim they were discouraged from submitting overtime compensation forms. As a result, they argue that they have not been credited with all of the overtime work that they have performed. Specifically, the officers state that, if they worked overtime that amounted to less than 30 minutes, they were discouraged from or explicitly told not to submit overtime compensation forms for those minutes. *See* Liptak Dep. at 6-7; Jones Dep. at 22; Rosa Dep. at 53 (stating that he was told by supervisors not to submit an overtime form over ten times).

Defendant claims that officers have been fully compensated for all post-shift work done by them. *See* Williams Aff. ¶ 11; Newman Aff. ¶ 13 (stating that he "never had a problem with either Officer Rosa or Nidiffer failing to submit a[n overtime] slip when they were supposed to"). Moreover, to the extent that Plaintiffs have failed to turn in their overtime slips, Defendant claims that Plaintiffs themselves are at fault for any work for which they have not been compensated. *See* Lynch Dep. at 48 (stating that "I never thought about" submitting time for certain overtime spent helping a recruit).

Because Plaintiffs claim that the City has a practice of failing to compensate officers for overtime work, and Defendant claims that all overtime work has been properly compensated, there remains a material issue of fact that precludes judgment at this stage. Moreover, whether Plaintiffs were actually "discouraged", and thereby prevented,

from submitting slips for overtime work performed by them is an issue of fact. Therefore, Plaintiffs' Motion for Summary Judgment must be denied as to their post-work overtime compensation claim claim.

3(D). Compensation for Off-Duty Training

Plaintiffs claim that City police officers are not always compensated for training for which they should be compensated. Officer Nidiffer claims that he attended a DUI class, a drug interdiction identification class, and a computer forensic class for which he was not compensated. Although the computer forensic class did not "directly relate" to Nidiffer's job, as the department did not have computers capable of doing such work, he claims that the drug interdiction identification class and the DUI class did pertain directly to his job. Officer Jones states that, if an officer requests to take a shooting class, for example, the police department may refuse to "send" him to the class and, if so, he will not be compensated for time spent at the class.

As previously discussed, Congress did not provide a definition of "work" under the FLSA, but rather left it to the courts to determine which employment-related activities are compensable "work" under the Act. Courts have construed "work" to mean all activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." *Muscoda*, 321 U.S. at 598, 64 S. Ct. at 703 (holding that underground travel to iron ore mines was compensable work). Under applicable regulations, "compensable hours of work" generally include time during which an employee is on duty, "as well as all other time during which the employee is *suffered or permitted to work* for the employer." *See* 29 C.F.R. § 553.221(b) (emphasis added).

In this case, the police officers claim that they should be compensated for voluntary, off-duty training that is has been

disapproved by the City. However, using the generally accepted definition of "work", duties must be "controlled or required" by the employer in order to constitute "work." Therefore, where, as here, the employer has explicitly rejected or disapproved of its employee taking a particular class or training program, but the employee nonetheless chooses to participate in the course of his own volition and on his own time, that training cannot be said to be "controlled or required" by the employer. Nor could it be considered to be time during which the employee is "suffered" or even "permitted" to work for the employer.

Because voluntary training, which is disapproved by the City, is not controlled, required, or even permitted by the City to be done on its behalf, such training is not compensable "work" under the FLSA. Plaintiffs' Motion for Summary Judgment will be denied on this issue, and Defendant's Motion will be granted.

3(E). Compensation for Canine Care

Plaintiffs further claim that officers have been under-compensated for time spent doing off-duty care of law enforcement canines. Defendant presently compensates officers who work with canines for one hour of home canine care per day, i.e., 28 hours of canine care per each 28-day cycle. Defendant claims that it arrived at the one-hour number by doing research on the issue and states that one hour is "generous" based on studies that it has done. *See* Mathias Aff. ¶¶ 5-6. Plaintiffs counter that one hour is not enough, when time spent running and feeding the dog, as well as vacuuming the officer's automobile, is taken into account.

In *Reich v. New York City Transit Authority*, 45 F.3d 646, 650 (2d Cir. 1995), the Second Circuit Court of Appeals held that "feeding, training, and walking are work and are indispensable to the dogs' well-being and to the employer's use of the dogs in its business." Indeed, such work is clearly

"suffered" for and permitted by the City, which requires officers with canines to train such dogs for use in performing law enforcement activities. Given that the City requires its canine officers to use dogs in the line of duty, "feeding, training and walking" the canines are activities that are clearly integral to the officers' law enforcement duties. Defendant apparently agrees that such activities should be compensated by the City, and claims that it took such activities into account in calculating the one-hour per day canine compensation figure.

However, if the feeding, training and walking were the only activities that required compensation, the evidence on the record indicates that canine officers would spend only 25 to 40 minutes doing canine-related work each day and the one-hour compensation scheme would be sufficient. *See* Gray dep. at 30, 34 (stating that he does 15 to 20 minutes of canine care in the morning and 10 to 20 minutes of canine care in the evening). However, Plaintiffs argue that 20- minutes per day of automobile vacuuming should also be considered compensable canine care. If vacuuming were included, the record supports that canine officers would spend more than one hour a day on canine-related duties.

Unfortunately for Plaintiffs, however, Defendant has presented uncontroverted evidence that the City had no knowledge that its canine officers were spending 20 minutes per day vacuuming their automobiles. The record shows that then-Sergeant Kenneth Mathias informed the canine officers that they would receive one hour per day for home animal care, and that no officer told Mathias that he took more than one hour doing such duties. Moreover, Plaintiffs present no evidence that any other supervisor had knowledge that the canine officers were doing 20 minutes of vacuuming per day. Because the City had no knowledge of the vacuuming, it was clearly not "controlled or required" by the employer. In fact, when the City did become aware of the 20-minute vacuuming

practices, subsequent to Gray's deposition testimony, the City instructed its officers to perform any required vacuuming on-duty, so that off-duty vacuuming was no longer permitted or required.

The Court agrees that canine care, including feeding, walking, and other requisite duties, should be compensated as "work." However, the Court does not agree that the ancillary task of automobile vacuuming should be compensable, where the employer was unaware of the task or the fact that it was being performed in such a way that it required 20 minutes of the officers' daily canine-related activities. Absent the 20-minute vacuuming routine, Plaintiffs' canine activities were adequately compensated under the City's policy of granting each canine officer one hour of "off-duty" compensation for canine-related activities. Accordingly, Plaintiffs fail to support that canine officers have been improperly compensated for their work. Accordingly, Plaintiffs' Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted as to this claim.

3(F). Designation of Sergeants as "Exempt" Employees

Plaintiffs further claim, on behalf of certain members of the consenting group, that the City has misclassified its police sergeants as "exempt" employees. Under 29 U.S.C. § 213(a)(1), bona fide executive, administrative, and professional employees are exempt from the requirements of the FLSA. Whether a person qualifies for the exemption is based on: (1) whether the employee's duties are primarily managerial in nature; (2) whether the employee's salary meets a particular level; and (3) whether the employee meets the "salary basis" test. *See* 29 §§ C.F.R. 541.1, 541.1(f); 541.118; *see also* 29 C.F.R. §§ 541.2, 541.3. In all cases, the burden of employer bears the burden of demonstrating that its employees are exempt. *See Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1070 (1st Cir.1995).

First, this Court must consider whether the duties of the City's sergeants are primarily managerial. Whether management duties constitute a "primary" job duty is determined on a case-by-case basis. *See* 29 C.F.R. § 541.103. Generally speaking, an employee meets the "duties" test if "the employee's '*primary duty* consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein.'" *Shockley v. City of Newport News*, 997 F.2d 18, 25 (4th Cir. 1993), (citing 29 C.F.R. § 541.1(f)) (emphasis in the original). As a "rule of thumb", this means that an employee must devote over fifty percent of his time to managerial duties in order to meet the threshold. *See id.* at 26.

In this case, the record supports that each sergeant is in charge of a police squad, for which his "primary duty [is] . . . to supervise the officers assigned to [that] squad." See Brown Aff. ¶ 21. Moreover, the record is clear that sergeants "devote more than fifty percent of their time to management responsibilities" and that they always supervise at least two other employees. *Id.* ¶¶ 21, 22. For all of these reasons, the sergeants' "duties" are primarily managerial.

They City's sergeants also meet both the "salary level" and "salary basis" tests. The sergeants meet the requisite level of salary because their starting pay exceeds $250 per week. *See* 29 C.F.R. § 541.1. They similarly pass the "salary basis" test because they are, in fact, paid on the basis of a "salary."

"According to the regulations, 'an employee will be considered to be paid "on a salary basis" . . . if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.'" *Auer v. Robbins*, 519 U.S.

452, 455, 117 S. Ct. 905, 908, 137 L. Ed. 2d 79 (1997). The method of salary payment notwithstanding, employees who are covered by a "policy that permits disciplinary or other deductions in pay 'as a practical matter'" are deemed not to be paid on a salary basis and, therefore, not exempt from the FLSA. See Auer, 519 U.S. at 461.

In this case, the City's police sergeants receive their pay in the form of a salary, paid out in a certain amount each pay period. However, Plaintiffs argue that sergeants are not on a "salary basis" because they are subject to disciplinary deductions from their pay. However, the record does not support such a finding. Under *Auer*, the Supreme Court has held that there must be a "clear and particularized policy [of deductions based on disciplinary action]—one which "effectively communicates" that deductions will be made in specified circumstances." *Auer*, 519 U.S. at 462. In this case, Plaintiffs present no evidence of any such policy, nor of any case in which a sergeant has been subject to such disciplinary deductions. Accordingly, Plaintiffs' Motion for Summary Judgment is denied and Defendant's Motion is granted on this issue.

3(G). Inclusion of Periodical Bonuses in "Regular Rate"

During each of the past two years, employees of the City have been given a bonus as a result of increases in the City's revenue during those years.[3] In 1998, City employees received $500 in such bonuses and in 1999, City employees received $250. Plaintiffs claim that the City has incorrectly failed to include periodical bonuses in their "regular rate" of pay. The "regular rate" is calculated by dividing the annual

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[3] Specifically, the bonuses were paid to all full-time employees on the City's payroll from January to mid-February after the bonuses were authorized by the City. *See* Benton Aff. ¶ 11.

salary by the number of hours worked during the year. The amount of overtime pay that is paid to the City's officers is calculated based on the regular rate.

The "regular rate" of pay "includes all remuneration for employment paid to, or on behalf of, the employee". However, Title 29 U.S.C. § 207(e) expressly excludes from the "regular rate" all "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service." See 29 U.S.C. § 207(e)(1). Such gifts should be excluded from the "regular rate" so long as the amounts of the gifts "are not measured by or dependent on hours worked, production, or efficiency." *Id.*

In this case, the annual bonuses were given to all employees of the City and were not measured by or dependent on the hours worked by City employees. *See* Benton Aff. ¶ 4. Nor were the bonuses measured by the employees' levels of production or efficiency. *Id.* Because the bonuses, therefore, were in the nature of gifts, they were properly excluded from calculation of the "regular rate" of pay.

Alternatively, the bonuses are excludable under 29 U.S.C. § 207(e)(3)(a). Title 29 U.S.C. § 207(e)(3)(a) excludes from the "regular rate" any sums paid in recognition of services performed during a given period if: (1) the fact that payment is to be made at the sole discretion of the employer near the end of the time period and (2) the amount of the payment are determined at the sole discretion of the employer and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Because the City's bonuses are excludable on these bases, they should not be included in the calculation of the "regular rate".

Accordingly, Plaintiffs' Motion for Summary Judgment on this issue is denied, and Defendant's Motion is granted.

3(H). Inclusion of Longevity Pay in "Regular Rate"

Plaintiffs also argue that their longevity pay should be included in the calculation of the "regular rate." In Raleigh, a longevity payment may be made to a City police officer, so long as: (1) the officer has given five years of service to the City; and (2) he has not received an annual performance evaluation rating of "Needs Improvement" or "Unsatisfactory". The amount of an officer's longevity payment is calculated as a percentage of the officer's income. While Plaintiffs claim that longevity payments should be included in calculating the "regular rate", Defendant argues that longevity pay is a "sum paid as a gift as a reward for service," *see* 29 U.S.C. § 207(e)(1), and that the longevity pay is therefore excludable.

As discussed above, gifts should be excluded from the calculation of "regular rate" so long as the amounts of the gifts "are not measured by or dependent on hours worked, production, or efficiency." *See* 29 U.S.C. § 207(e)(1). In this case, even if an employee were to work more than five years for the City, he would not receive a longevity payment if his performance rating (based on his performance) had fallen below a certain threshold. Therefore, although the longevity payments are not directly proportional to employees' efficiency or productivity, they are certainly "dependent" thereupon.

Because the longevity payments may be withheld at the discretion of the City, on the basis of the police officer's performance rating or efficiency, the officers' longevity pay is not excludable under 29 U.S.C. § 207(e)(1). Moreover, the longevity payments are not excludable on any other basis, so they must be included in calculating the "regular rate". Accordingly, Plaintiffs' Motion for Summary Judgment on this point must be granted and Defendant's corresponding Motion for Summary Judgment be denied.

3(I). Compensatory Time

Plaintiffs also claim that Defendant has violated FLSA's requirements with regards to its policy governing the use of compensation time. Title 29 U.S.C. § 207(o) provides that employees of public agencies may be compensated for overtime work with compensatory time off in lieu of cash payment. Title 29 U.S.C. § 207(o)(5) further requires that use of such compensatory time shall be given to such employee "within a reasonable period after [the employee] makes the request [for the use of the time] if the use of the compensatory time does not unduly disrupt the operations of the public agency."

In 29 C.F.R. § 553.25(c)(1), the Department of Labor ("DOL") states that what qualifies as a "reasonable period" of time is based upon the customary work practices, including but not limited to the following: "(a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff." The DOL also clarifies the "undue disruption" standard, by stating that "mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off." The DOL noted that, for an employee's request to be "unduly disruptive", the employer must "reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services." *See* 29 C.F.R. § 553.25(d).

In this case, the City's stated policy is that a request for "comp time . . . should be given to the employee . . . within a reasonable time as long as it does not unduly disrupt the[] operations [of the police department]." *See* Dominick Dep. at 39. In practice, the Platoon Captain is "allowed to make the decision on how many people [will] be [allowed] off [on a particular day], depending on the work load, the shift, the

events that are happening." *See* Knox Dep. at 46. Knox states that the Platoon Captain has arrived at that number by determining "what it takes to cover the City safely, period." *See id.* at 49. When the "log book" is filled for a particular day, no other officer may take that day off.[4]

Plaintiffs claim that the City has violated the "undue disruption" standard in that it has a practice of denying comp time requests on occasions when, to grant such requests would not be "unduly disruptive." Plaintiffs claim that, in practice, "requests to use comp time are denied . . . absent conformance with an 'unduly disruption' standard." See Plaintiffs' Memo. in Supp. at 30. Specifically, they complain that Defendant denies comp time requests without regard for available substitute officers who are willing and able to substitute for the requesting officer.

The stated policy of the City is to grant such requests if they are made in a reasonable time and do not "unduly disrupt" the operations of the police department. The City's formal policy is obviously complaint with 29 U.S.C. § 207(o)(5), as it merely restates the requirements of the Statute. However, in practice, the City implements this stated policy by allowing its Platoon Sergeants to set certain "minimum employment levels". Furthermore, when these minimum employment levels are reached (i.e., the log books "are full"), any officer seeking to use his comp time on that particular day will be denied.

This Court agrees that maintaining minimum employment levels is crucial to ensuring safety and order in the City of Raleigh. However, to comply with the "undue disruption" standard, the City must turn down comp time requests, only

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[4] Generally speaking, a squad's log book will be filled on a particular day as soon as one or two officers are taking the day off. As officer Liptak stated, "A lot of times if there is already somebody off on my squad, then we don't get a chance to take off, so it's disapproved."

when granting them would impose an unreasonable burden "during the time requested". *See* 29 C.F.R. § 553.25(d). Although the applicable regulation is ambiguous as to what constitutes an unreasonable or undue disruption, the Secretary's preamble to the interpreting regulations clarifies its meaning. The preamble clearly states that:

> "situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive."

52 Fed. Reg. 2012, 2017 (1987). Moreover, although this interpretation is not entitled to *Chevron* deference, it is entitled to "respect" if it has the "'power to persuade'". *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)).

This Court finds the Secretary's interpretation persuasive and holds that, because Defendant is unwilling to substitute officers who may need to be paid overtime to grant an officer's comp time request, it thereby denies requests when doing so would not impose undue hardship. It is therefore possible for the City to grant comp time requests, even when the log book is "full", without causing staffing levels to fall below the critical level. To do this, the City need find replacements for the requesting officers and may, in some cases, be required to pay "overtime" to such replacement officers. However, to so accommodate its officers would not impose "undue hardship" on the City.

For these reasons, the Court will grant Plaintiffs' Motion for Partial Summary Judgment on this issue and will deny Defendant's Motion for Summary Judgment.

3(J). Statute of Limitations

Lastly, Defendant has moved for summary judgment as to all claims based on violations allegedly done prior to May 17, 1997. Plaintiffs seek recovery for claims that accrued more than three years prior to the filing of the instant suit on May 17, 1999. However, under 29 U.S.C. § 255(a), absent a willful violation, an FLSA claim must be commenced within two years after the claim accrues. If an employee can show that his employer acted willfully, the statute of limitations is extended to three years.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988), the Supreme Court held that [HN19] an employer "willfully" violates the FLSA if: (1) the employer actually knows its conduct is in violation of the law; or (2) the employer acts in reckless disregard for whether the conduct violates the law. *Id.* at 133, 135. Therefore, "if an employer acts unreasonably, but not recklessly, in determining its legal obligation, then . . . it should not be . . . considered [wilful] under . . . the . . . standard we approve today." *Id.* at n. 13.

In this case, Plaintiffs offer no evidence that Defendant had actual knowledge that it was violating the FLSA. Neither have they demonstrated a reckless violation of the FLSA by Defendant. Accordingly, Plaintiffs' action will be subject to a two-year statute of limitations.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Add 17 Consenters and Motion to Exceed Page Limitation are hereby GRANTED. Both Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment are hereby GRANTED in part and DENIED in part.

SO ORDERED.

This 8th day of August, 2001.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed Mar. 22, 2002]

C.A. No. 01-1617-A

ALEXANDRIA COALITION OF POLICE, LOCAL 5, I.U.P.A., AFL-CIO, *et al.*
Plaintiffs,

v.

THE CITY OF ALEXANDRIA, VIRGINIA, *et al.*
Defendants.

JOINTLY STIPULATED ORDER ON OFFICERS'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff Alexandria Police Officers and The City of Alexandria, Virginia, and other consenting Alexandria Police Officers request Summary Judgment that their rights under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* have been violated in four ways. The Officers argue:

1. *Shift Deferential & Regular Rate.* That the shift differential received by non-exempt police officers should be, but has not been, until at least January 2002, included in calculating their regular FLSA overtime rate;

2. *Hours of Work: Pre and Post Shift.* That when their employer "suffers and permits" non-exempt employees to work additional post and pre-shift time, that such time must be, and on occasion has not been, counted as FLSA work time.

3. *Hours of Work.* That non-exempt employees who have left the regular place of work and then are notified to return for callback should be credited callback time as hours of work on a portal-to-portal basis. Since officers do receive a minimum of two hours call back pay at twice their regular rate, additional FLSA compensation would be due only in situations in which additional overtime is owed having credited the employer with the "automatic" callback pay.

4. *Compensatory Time.* That under FLSA § 207(o)(5) and its implementing regulations, the fact that overtime may be required of one employee to permit another non-exempt employee to use accrued FLSA compensatory time off does not constitute an undue burden on the employer's ability to provide services of acceptable quality and quantity for the public during the time requested. The City has used a system on granting or denying requests to use accrued comp time based on minimum staffing levels which has resulted in denying requests under circumstances which did not meet the undue burden rule.

The Defendant City of Alexandria replied to the motion for summary judgment without disputing the facts submitted by the Officers and by indicating the City concurred with the Officer on the requirements of each of the applicable FLSA rules.

The parties indicate that they are working to achieve agreement of revised Police Policies in each of these areas and that the issue of remedy, measure of damages or methods of calculation of individual damage claims, including the applicable statute of limitation, the availability of liquidated damages, and the Officers's right to attorneys fees and costs remain to be resolved.

Accordingly, the Court (a) cancels the argument on summary judgment ordered for March 22, 2002; (b) grants the Officers their motion for partial summary judgment on each of the four points outlined above; subject to the entry of a final order; and (c) directs the parties to report on their progress toward settlement of the remaining issues by April 19, 2002.

/s/ W. Curtis Sewell
W. CURTIS SEWELL
Magistrate Judge

WE ASK FOR THIS:

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